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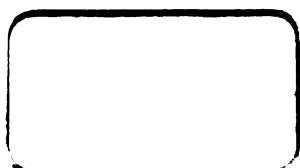
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Aug 19

38

# IRISH CHANCERY REPORTS,

BEING A SERIES OF REPORTS OF

## CASES

ARGUED AND DETERMINED IN

THE HIGH COURT OF CHANCERY

AND

THE ROLLS COURT,

IN

IRELAND,

DURING THE YEARS 1852, 1853 AND 1854.

**Chancery:**

BY MICHAEL ROBERTS WESTROPP, Esq.

**Rolls:**

BY EDWARD SHIRLEY TREVOR, Esq.

VOL. III.

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1855.

*Rec. Jan. 26, 1869*

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# JUDGES AND LAW OFFICERS

*During the period of these Reports.*

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## HIGH COURT OF CHANCERY.

*Lords Chancellor*.—The Right Hon. MAZIERE BRADY.

The Right Hon. FRANCIS BLACKBURNE.

*Master of the Rolls*.—The Right Hon. THOMAS BERRY CUSACK SMITH.

## ATTORNEYS-GENERAL.

The Right Hon. JOSEPH NAPIER.

The Right Hon. ABRAHAM BREWSTER.

## SOLICITORS-GENERAL.

JAMES WHITESIDE, Esq., Q. C.

WILLIAM KEOGH, Esq., Q. C.

## SERJEANTS.

JOHN HOWLEY, Esq., Q. C.

JAMES O'BRIEN, Esq., Q. C.

JONATHAN CHRISTIAN, Esq., Q. C.

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IN Hilary Term 1854, 28th January, LOFTUS HENRY BLAND, RICHARD ARMSTRONG and JOHN THOMAS BALL, Esquires, having been appointed of Her Majesty's Counsel, were sworn and admitted to the Inner Bar.

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## NOTE.

The Cases in Chancery, from Hilary Term 1854, inclusive, are reported by J. P. KENNEDY, Esq.

#### CORRIGENDA.

- Page 47, line 10, marginal note, for "mortgagee" *read* "mortgagor."
- „ 126, line 21, for "before" *read* "upon."
- „ 142, line 17, for "1808" *read* "1708."
- „ 330, line 22, for "defendants" *read* "plaintiffs."
- „ 374, line 35, for "Justice," *read* "Baron."
- „ 414, line 8 from end of marginal note, for "stock. The day," *read* "stock on the day."
- „ 418, line 9, after "of" *insert* "£1382. 6s. 1d. cash, the price of."
- „ 485, line 14, for "favour" *read* "face."

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# CHANCERY REPORTS,

BEING A SERIES OF

## CASES ARGUED AND DETERMINED

IN THE

## HIGH COURT OF CHANCERY

AND

## ROLLS COURT.

WALCOTT v. CONDON.

(*Chancery.*)

1852.  
Nov. 17, 19  
24, 29.

1853.  
April 27, 28.

THIS was a foreclosure suit: the ordinary decree to account had been made in respect of the plaintiff's mortgage, bearing date on the 30th of April 1825, and hereafter more particularly alluded to.

In 1820 Blackacre and other lands were mortgaged for £1200. The equity of redemption in Blackacre having subsequently devolved upon A, he mortgaged it in 1825 to the plaintiff. In 1830 A contracted with B, that on B's paying to the mortgagee of 1820 the sum of £565, then remaining due on that mortgage, an annuity of £66 per annum should be "effectually granted to B out of the mortgaged premises." B paid £565 to the mortgagee of 1820. By deed of the 7th of November 1830, to which the only parties were the mortgagee of 1820, and C, the brother of A, reciting that £1454 was due on the mortgage of 1820, the mortgagee, in consideration of £1281, expressed to be paid to him by C "and others for his use," conveyed Blackacre and the other mortgaged lands and the mortgage debt to C, his executors, administrators and assigns. By a deed, bearing date on the following day, reciting the mortgage of 1820, and that C had become entitled to it, and that A had become entitled to "several parts of the mortgaged premises," and that A and C had agreed to grant an annuity out of those premises—they, in consideration of £565, expressed to be paid to them, granted the annuity of £66 to B out of the mortgaged premises, including Blackacre. Then followed a covenant by A to pay the annuity; and, as a further security for the annuity, A and C demised the premises for two hundred years to a trustee for B. *Held*—That as against the lands of Blackacre, the annuity was, to the extent of the sum due on the mortgage of 1820, prior to the plaintiff's mortgage of 1825.

The cases of *Toulmin v. Steere* (3 Mer. 210) and *Parry v. Wright* (1 Sim. & Sta. 369; S. C. 5 Russ. 142) considered.

Whether judgments entered within twenty years before the passing of the Re-docking Act, 9 G. 4, c. 35, and not re-docketed within twenty years from their entry, or within five years from the passing of the Act, are void as against a purchaser (a mortgagee of 1825), who became such before the passing of the Act? *Quere.*

*Held*—That such judgments were void as against a sub-mortgage (made in 1841) of the mortgage of 1825.

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James Condon, sen., being seised of an estate for lives (with a covenant for perpetual renewal), in the lands of Scart, by indenture of the 28th of December 1820, mortgaged them, together with other lands, to John Gunn, for £1200.

By indenture of the 15th of March 1825, Gunn transferred, assigned and conveyed that mortgage debt and the mortgaged lands to Delmege. The Master's report found that "several payments were made to Delmege, in discharge of the principal, and in 1830 £565 alone remained due on foot of that mortgage; that James Condon the younger had, on the death of the mortgagor, James Condon, sen., become entitled to his estate in the lands of Scart, and in October 1830 applied to David Ferguson the elder for the sum of £565 to be paid to Delmege, being the sum due on foot of the mortgage, in order that an annuity or rentcharge of £66. 7s. 9d. might be effectually granted to that David Ferguson, charged upon and payable out of all the said mortgaged premises, for the life of his son Robert Ferguson; and that he David Ferguson, on the 8th of November 1830, paid to Delmege the sum of £565." To this part of the report exceptions were taken, on the ground that no evidence had been adduced to support it, but, not having been lodged within the time required by the General Order, were not permitted to be argued. The two following indentures were executed upon the occasion referred to by the report. The first bore date on the 7th of November 1830, and was made between Delmege of the one part, and Richard Smith Condon\* of the other part. It recited the mortgage of 1820, and the assignment of it by Gunn the mortgagee to Delmege in 1825; and that there was on the 29th of October 1829 due to Delmege £1412. 12s. 4d., Irish currency, for principal, interest and costs; and a further sum of £41. 16s. 10d., like currency, accrued due for the interest on the balance then remaining due—making together £1454. 9s. 2d. And it witnessed that Delmege, "for and in consideration of the sum of £1281. 9s. 2d., Irish currency, making in British currency the sum of £1182. 16s. 2d. sterling, then and theretofore in hand paid to him by Richard Smith Condon and others, for his use and on his own

\* He was brother to James Condon, jun.

account, in manner aforesaid, the receipt of which Delmege did thereby acknowledge," granted, bargained, sold, assigned, transferred and made over to Richard Smith Condon (in his actual possession then being, by virtue of a lease for a year) the lands of Scart and the other mortgaged lands, together with the said mortgage debt of £1200, and all interest due or to grow due thereupon, to hold to him Richard Smith Condon, his heirs, executors, administrators and assigns, subject to the condition of redemption in the mortgage deed of the 20th of December 1820. And Delmege covenanted that he had not been otherwise paid the principal (£1200) or the sum due for interest and costs thereupon, nor any part thereof.

The second deed bore date the 8th of November 1830, and was made between James Condon the younger and Richard Smith Condon of the first part, David Ferguson, sen., of the second part, and David Ferguson, jun., of the third part. It recited the mortgage of the 20th of December 1820, and that Richard Smith Condon, by mesne assignment, had become entitled to that mortgage and the mortgaged premises, subject to redemption, and that James Condon the younger had become entitled to "the estate of James Condon the elder, deceased, in several parts of the mortgaged premises." It next recited that James Condon the younger and Richard Smith Condon, for the considerations thereafter mentioned, had "agreed to grant unto the said David Ferguson, sen., an annuity or yearly rentcharge of £66. 7s. 9d., to be issuing and payable out of said several lands and premises." The deed then proceeded thus: "Now this indenture witnesseth, that the said James Condon the younger and Richard Smith Condon, for and in consideration of the sum of £565 sterling, now in hand paid to them by the said David Ferguson, sen., the receipt of which sum they the said James Condon the younger and R. S. Condon do, and each of them doth, hereby respectively acknowledge, they the said James Condon the younger and R. S. Condon have, and each of them hath, according to their respective estates and interests therein, granted, bargained, sold, assigned, transferred and made over, and by these presents do, and each of them doth, grant, &c., &c., unto the said David Ferguson, his heirs and assigns, one annuity, clear yearly rentcharge, or sum of

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£66. 7s. 9d., to be issuing out of, and charged and chargeable upon, and payable out of, all" the lands named in the mortgage of the 20th of December 1820, including the lands of Scart, to hold the annuity to him (David Ferguson, senior), his heirs and assigns, from the 29th of September then last, for the life of his son Robert Ferguson, then nineteen years of age. Then followed the usual power of distress, and a covenant by James Condon the younger to pay the annuity. The deed then proceeded thus:—"And this indenture further witnesseth, that for the considerations aforesaid, and for the more effectual securing the payment of the said annuity unto the said David Ferguson, sen., his heirs and assigns, for the term aforesaid, and in consideration of the sum of ten shillings, to the said James Condon the younger and Richard Smith Condon now in hand paid to them by the said David Ferguson, jun., the receipt whereof is hereby acknowledged, they the said James Condon the younger and R. S. Condon, according to their respective estates and interests therein, have, and each of them hath, granted, bargained, sold, assigned, transferred and made over, and by these presents doth, and each of them do, grant &c., &c., unto the said David Ferguson, jun., his heirs, executors, administrators and assigns," all the lands comprised in the mortgage of 1820, including the lands of Scart, to hold for the term of two hundred years, upon trust, by demise, sale or mortgage thereof, to secure payment of the annuity. This deed also declared that upon the bond of James Condon to David Ferguson, sen., for £1130, and conditioned for payment of the annuity, it should, as well as upon any judgment entered upon it, be allowable for David Ferguson, sen., his heirs and assigns, to proceed, in the event of the annuity being unpaid for forty days. Lastly, there came a proviso that it should be lawful for James Condon the younger, or Richard S. Condon, their heirs, executors, administrators or assigns, to re-purchase the annuity on any gale day during its continuance, and upon paying to David Ferguson, sen., his heirs or assigns, the sum of £565, together with all arrears of the annuity, on giving six months' previous notice of their intention so to do; and that in such event David Ferguson

should re-convey the annuity, and that the trust term to secure it should cease.

By indenture of the 30th of April 1825, reciting that Richard Smith Condon was entitled to part of the lands of Kilscannell, and that James Condon was entitled to another part of Kilscannell and other lands, and one-tenth part of the lands of Cappagh, and was also entitled to the lands of Scart, they, Richard Smith Condon and James Condon, according to their respective rights and interests in these lands, mortgaged them to Walcott, the plaintiff, for the sum of £1000. This mortgage contained a covenant to keep the mortgagee indemnified against any incumbrances save two, which it specified. The mortgage of the 28th of December 1820, of the lands of Scart to John Gunn, was not alluded to. It should be observed that the lands of Kilscannell were not included in the mortgage of the 28th of December 1820. The lands of Scart and other lands were comprised in that mortgage.

By indenture of the 15th of July 1841, the mortgage to Walcott, of the 30th of April 1825, was sub-mortgaged to Seymour.

In Hilary Term 1819, Mary Cripps recovered four judgments in the Court of Exchequer against Richard Smith Condon and James Condon, and two of those judgments were subsequently assigned by her to Odell and Smyth. None of the four judgments were ever revived or re-docketed.

The Master, by his report, already mentioned, found that the annuity created by the indenture of the 8th of November 1830 had, to the extent of the sum due on the mortgage of December 1820 (assigned to R. S. Condon, by the deed of the 7th of November 1830), as against the lands of Scart, priority over the mortgage to plaintiff in 1825, and over the sub-mortgage of 1841, and was therefore to that extent the first charge upon Scart. The reason assigned by the Master for this finding was, "that said sum of £565 having been paid by the said David Ferguson, and said mortgage debt and security not having been extinguished, but having been assigned to the said Richard Smith Condon, and so kept alive, and the said R. S. Condon having granted the said annuity out of all the lands and premises included in said mortgage of the 20th

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of December 1820, while the said James Condon, who joined in said grant, was only entitled to a portion of said lands and premises, the said annuity and the arrears thereof, to the extent of the sum due and to grow due on foot of said mortgage (1820), was in priority equal to that mortgage, and prior to the said mortgage of the 30th of April 1825."

To that finding the plaintiff excepted.

The Master found that the four judgments above-named formed the second charge upon the lands of Scart and Cappagh, and were in equal priority with each other. It was contended that Seymour, the sub-mortgagee of 1841, being a purchaser for valuable consideration, was, by the statute 9 G. 4, c. 35, entitled to priority over those judgments, inasmuch as they had not been revived or re-docketed within twenty years next before the execution of the sub-mortgage of 1841, or within five years from the passing of the Act. The Master, however, overruled that objection, and thus stated his reasons:—"Inasmuch as the original mortgage of 30th of April 1825, out of which the sub-mortgage of 15th of July 1841 was created, was executed within twenty years from the entry of said judgments, I considered that the judgments were prior to said mortgage, so far as the same affected the lands of Scart and Cappagh; and it appearing to me that the sub-mortgage was a mortgage by the mortgagees of the estate, mortgaged to them to secure payment of a sum of money out of the original debt and interest which had accrued on it (but to which second mortgage the original mortgagors were no parties), I was of opinion that the second mortgage, not being a conveyance by the original owners, was in substance and effect only a transfer of the original security, and was not within the meaning of the said Act, and consequently had no better priority than the original mortgage of the 30th of April 1825."

Mr. Serjeant *Christian* and Mr. *Robert R. Warren*, for the plaintiff.

*Argument.*

The plaintiff's mortgage of 1825 is entitled to precedence over the annuity granted in 1830 to Ferguson. In order to support his

claim to priority, through the medium of the outstanding mortgage of 1820, he was bound to have shown that he stipulated with James Condon that the mortgage of 1820 should form a security for the annuity. In *Watts v. Symes* (a), *McKenzie v. Gordon* (b), and all other instances in which a puisne incumbrancer was deemed entitled to the security of an elder incumbrance against the mesne claimant, it was so held upon the ground of contract to that effect. But in *Toulmin v. Steere* (c), *Parry v. Wright* (d), and *Medley v. Horton* (e), there being no such contract, the decision was against the puisne incumbrancer, and the securities were held to rank according to the dates. Is there any evidence here of such a contract? The evidence relating to the transaction consists of three matters—the deeds of the 7th and 8th of November 1830, and the finding in the Master's report. The report does not find any express contract to grant the annuity out of any thing except the mortgaged premises. To the deed of the 7th of November 1830, Ferguson was not even a party. The *cestui que trust* is usually a party to a deed for his benefit. He could not have sought for such a deed as it, in order to guard himself against the plaintiff's mortgage, inasmuch as he has sworn that he was not cognizant of the existence of that mortgage. Richard Smith Condon, the assignee in the deed of the 7th of November 1830, of the mortgage of 1820, was brother to James Condon, the mortgagor, and therefore, in all probability, his trustee. Ferguson, when he named a trustee, selected his own son, as appears by the deed of the 8th of November 1830. On the contract for the annuity being made, Ferguson became, in equity, the owner of the annuity, and James Condon became owner of the purchase-money. It being his money, it was his right to direct the application of it; and it was indifferent whether it was paid to Delmege or to James Condon. Such, in fact, was the case of *Parry v. Wright*.—[The LORD CHANCELLOR. Upon the facts of this case, I can hardly

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(a) 1 De Gex, Mac. & Gor. 240.

(b) 6 Cl. & F. 875.

(c) 3 Mer. 210.

(d) 1 Sim. & St. 360; affirmed on appeal, 5 Russ. 142.

(e) 14 Sim. 226.

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believe it possible that the purchase-money was intended to be the property of James Condon.]—Would not Ferguson have taken assignments of the outstanding judgments collateral with the mortgage of 1820, if it were his intention to have the security of that mortgage?—[The LORD CHANCELLOR. He took the legal estate; that was enough.]—In *Parry v. Wright* and *Toulmin v. Steere* the puisne claimant had the legal estate. The taking of a limited term, as a security for the annuity, in the deed of the 8th of November, is inconsistent with an intention to take any interest in the mortgage. It is difficult to see why the circumstance relied on by the Master, of there being other lands affected by the annuity, to which lands James Condon was not entitled, besides the lands of Scart, to which he was entitled, can make any difference in this case, or prevent the application of the doctrine of *Parry v. Wright*. The case is not altered by the circumstance of Ferguson alleging that he purchased the annuity without notice of the plaintiff's mortgage, inasmuch as that mortgage was registered: *Drew v. Lord Norbury* (a).

For the plaintiff it is further contended, that the judgments recovered in 1819, not having been revived or re-docketed, became in 1839, under the statute 9 G. 4, c. 35, s. 2, void as against the mortgage of 1825. An enumeration of the authorities will show so great a conflict of judicial opinion upon the point, that it is evident it can only be finally settled by the Court of last resort. In *Blake v. D'Arcy* (b), Sir M. O'Loughlen, M. R., decided in favour of the judgment creditor. In *Knox v. Kelly* (c), Lord Plunket gave his opinion in favour of the purchaser. In that case the Masters of the Court disagreed in opinion upon this point. And when *Blake v. D'Arcy* came before Lord Plunket on appeal, he refused to hear the question re-argued, stating that he had re-considered his opinion in *Knox v. Kelly*; and, after conference with Sir M. O'Loughlen, still adhered to his first impression, and accordingly he reversed the order at the Rolls. Both in *Knox v. Kelly* and *Blake v. D'Arcy*, the purchase was made before the passing of the Act (1828), as in the present case, so far as regards the

(a) 3 Jo. & Lat. 267.

(b) S. & Sc. 493.

(c) 1 Dru. & Wal. 542.

mortgage of 1825. In *Hickson v. Collis* (a), Sir Edward Sugden approved of the decision of Lord Plunket in *Knox v. Kelly*, and held a judgment, entered within twenty years before the Act, void against a purchaser after the Act, and within twenty years of the entry of the judgment. In *Geraghty v. Abbott* (b), the Court of Exchequer came to a conclusion opposite to that of Lord Plunket in *Knox v. Kelly*. When *Hickson v. Collis* was re-heard before the Lord Chancellor (Brady), he reversed the decision of Sir Edward Sugden (c). In *Colyer v. Marnell* (d), the Court of Queen's Bench was equally divided on the question, as to whether or not the 2nd section of the Act applied to purchasers before the passing of the Act; Blackburne, C. J., and Crampton, J., being of opinion in the affirmative, and Burton, J., and Perrin, J., in the negative.

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Mr. *Brewster*, Mr. *H. Martley*, and Mr. *Ince*, for David Ferguson, the annuitant.

The report finds that David Ferguson paid the sum of £565 to Delmege, the mortgagee of 1820, who then assigned, not to the mortgagor James Condon, but to Richard Smith Condon. He must therefore be regarded as a trustee for Ferguson. The money was never that of the mortgagor, but was paid to a person having a mortgage over several denominations besides the lands of Scart. It evidently was the intent to keep alive the mortgage of 1820, in order to give the party a right to contribution out of the other lands. In *Parry v. Wright*, there was a trust to attend the inheritance, and there was an express trust for the mortgagor and a provision as to merger. Here, R. S. Condon was interposed to prevent the union of the mortgagee's interest with the equity of redemption. *Toulmin v. Steere*, which was also relied upon for the plaintiff, is unfavourably commented on in *Watts v. Symes*. The latter case governs the present one. To the same effect is *M'Kenzie v. Gordon*, decided by the highest tribunal. Even if the term be gone, yet Ferguson has a right to the annuity out of the

(a) 1 Jo. & Lat. 94; S. C. 6 Ir. Eq. Rep. 524.

(b) 8 Ir. Law Rep. 60.

(c) 10 Ir. Eq. Rep. 447.

(d) 10 Ir. Law Rep. 353.

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legal estate granted to him by the owner of that estate, the confirmation being that of a stranger; the equity of redemption, the deed of the 8th of November does not purport to pass at all. The case of *Barrett v. Merrick* (a) was also mentioned.

Mr. *F. Fitzgerald*, for Seymour, the sub-mortgagee of 1841.

It is evident from Lord Cottenham's judgment in *M'Kenzie v. Gordon*, at page 885 of the report, that he was of opinion that it can be only by virtue of a specific contract to that effect that the holder of the elder security could be regarded as a trustee for the puisne incumbrancer. The money happens to have been paid to Delmege; but Ferguson has not proved that there was any contract by him that it should be so paid, or that he was to have the benefit of the mortgage of 1820. It cannot be contended that the onus of proof, that such was not the contract, lies upon the party denying it to have been so. The owner of the equity of redemption is the owner of the estate, subject to incumbrances. *Primâ facie*, when a party lends money to the owner of the equity of redemption, and stipulates that an incumbrancer shall join in the conveyance to him, he must be understood as stipulating, not for the security of the incumbrance, but to be secured against the incumbrancer. The incumbrance must in such a transaction be regarded as extinguished. It may be afterwards convenient for the new lender to say, that he ought to be guarded against mesne incumbrances; but why did he not take an assignment of the prior charge to a trustee expressly for himself? It may be consistent with the facts, as found by the Master's report, that Ferguson stipulated for the security of the mortgage of 1820; but the Master has not found that there was such a contract. The deeds afford an inference to the contrary. The consideration for the transfer of the mortgage by Delmege to Richard S. Condon is not, by the deed of the 7th of November 1830, stated to be the sum of £565, but is stated at a sum of £1281. 9s. 2d., and to have proceeded not from Ferguson, but from R. S. Condon, and some other persons not named. There is not any mention of Ferguson

(a) 2 Jones, Exch. Rep., 193.

in that deed. What ground then is there for saying that R. S. Condon was his trustee? The dealing with James Condon, in the deed of the 8th of November, is in respect of the lands of Scart only; and R. S. Condon joins in that deed as the trustee of James Condon, and in order that the latter may be enabled to make an effectual grant of the annuity out of the legal estate, and for the purpose of removing the mortgage of 1820, so far as Scart was affected by it.

As to the judgments of 1819, Seymour relies upon all the cases cited in support of the priority of the plaintiff's mortgage of 1825. But Seymour's case is much stronger, inasmuch as his purchase deed (the sub-mortgage of 1841) was made more than twenty years since the entry of the judgments, and therefore is clearly within the 2nd section of the 9 G. 4, c. 35.—[The LORD CHANCELLOR. Such also is my present opinion.]—Even notice of the judgment to a purchaser for valuable consideration will not take it out of the operation of the statute: *Beere v. Head* (a).

Mr. *Blackham*, for Mrs. Cripps, one of the judgment creditors of 1819, relied on the cases already quoted, as containing decisions in favour of the judgment creditor, and also mentioned *Carroll v. D'Arcy* (b). He contended that the sub-mortgagee was not in any better position than the plaintiff, inasmuch as the sub-mortgage should be considered as a transaction *pendente lite*, the bill having been filed in 1837, and the judgment creditors having proved their demands in the Master's office, under the decree to account made in 1843. Such proof had relation back to the time of the filing of the bill: *O'Kelly v. Bodkin* (c); and as a purchaser during the pendency of the suit, the sub-mortgagee could not acquire any rights against the judgment creditors: *Trye v. The Earl of Aldborough* (d); *Bishop of Winchester v. Paine* (e); *L'Estrange v. Robinson* (f); *Joyce v. Joyce* (g).

(a) 8 Ir. Eq. Rep. 647; 9 Ibid, 76; S. C. 3 Jo. & Lat. 340.

(b) 10 Ir. Eq. Rep. 321.

(c) 2 Ir. Eq. Rep. 361.

(d) 1 Ir. Chan. Rep. 666.

(e) 11 Ves. 194.

(f) 1 Hog. 202.

(g) 3 Ir. Jur. 273.

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*Chancery.*

WALCOTT

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*Argument.*

Mr. *James Green*, for the other judgment creditors of 1819.

It was mentioned that the judgments of 1819 had been registered, but as that fact did not appear in the Master's report, his Lordship refused to notice it.

Nov. 24.

*Judgment.*

The LORD CHANCELLOR.\*

The question raised by the plaintiff's principal exceptions in this case is one of priority; the facts and instruments on which it depends are as follow:—In 1820, James Condon executed a mortgage of the lands of Scart to John Gunn for £1200. In 1825, James Condon mortgaged those lands to the plaintiff. James Condon, the mortgagor, died, and his estate in Scart vested in the defendant James Condon, jun. In 1830, Delmege was assignee of the mortgage of 1820, on which £565 were due, and on the 7th of November 1830 he assigned the mortgage to Richard Smith Condon; after reciting the mortgage of 1820, its assignment to Delmege, and that in 1829 £1454 was due, in consideration of £1281 paid to Delmege by Richard S. Condon and others for his use, Delmege assigned to him the mortgaged premises and the mortgage debt, subject to the original condition of redemption. A second indenture, dated the 8th of November (the next day), was executed between James Condon and Richard S. Condon of the first part, David Ferguson of the second part, and David Ferguson, jun., of the third part. This recites the mortgage of 1820, and that it had become vested by mesne assignment in Richard S. Condon; that James Condon had become entitled to parts of the premises, but subject to the mortgage, and that he and Richard had agreed to grant to Ferguson an annuity of £66. 7s. 9d., to be payable out of the lands; they then, in consideration of £565 to them paid, according to their several estates, grant to Ferguson an annuity for the life of David Ferguson, the younger. James Condon covenants to pay the annuity, and the two Condons grant a term to secure it.

These deeds are very sufficiently explanatory of the dealings and object of the parties. Ferguson had agreed to pay the sum due on

\* The Right Hon. FRANCIS BLACKBURNE.

the mortgage to Delmege, and for this he was to have an annuity charged on the premises, and derived from, and protected by, the legal estate of the mortgagees. The sum of £565 never was, nor was intended to be, in the hands or under the control of James Condon. The two deeds were parts of the same transaction, and the money, though nominally paid to Richard, who was the assignee of the mortgage, must have been actually paid to Delmege in the first instance, as the consideration for his executing the assignment of it. Accordingly, the moment Richard S. Condon acquired the legal estate, he granted the rentcharge to Ferguson; and though James Condon joined in the grant, and though the consideration is stated to have been paid to him jointly with Richard, the whole interest and estate conveyed were derived and served out of the legal title of Richard S. Condon. I am, I confess, at a loss to conceive at what time, prior to that at which Ferguson actually acquired a legal title, it can be contended that the mortgagee or Richard S. Condon was a trustee of the legal estate for James Condon: James Condon had neither paid the mortgage debt, nor was entitled to have the mortgage assigned to him, and had already contracted that Ferguson should have a legal rentcharge derived out of it. If, however, I am bound by authority to put a construction on these deeds, and impute an intention to the parties at variance with the legal operation of these deeds, and the nature of the transaction, I shall certainly do so with great hesitation and reluctance.

Now, as to authorities, I should scarcely venture, however high the authority of Sir William Grant, to act on the decision in *Toulmin v. Steere* (a), after the observations that have been made on it; but as the case of *Parry v. Wright* (b) has been mainly relied on, and is said to be almost in point, I shall shortly observe on it. There Madocks, in 1807, bought the equity of redemption. In order to pay off the prior mortgage he, three years afterwards (in 1810), borrowed £5000 of Wright, part of which was paid to himself, and part to discharge the mortgage; and a deed was executed, by which the deed granting the equity of redemption in 1807 was recited, and that Madocks was desirous of paying off the mortgage and

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Judgment.

(a) 3 Mer. 210.

(b) 1 Sim. & St. 369; S. C. 5 Russ. 142.

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*Chancery.*  
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 v.  
 CONDON.  
 Judgment.

procuring a re-conveyance of it; and then the mortgagee, in consideration of £3220 mentioned to have been paid by Madocks, conveys the mortgage to a trustee for Madocks: by a deed, executed the next day, Madocks granted the annuity to Wright, and his (Madocks') trustee demised for a term to secure it. This short statement, when contrasted with the facts before me, will show how essentially different the cases are: it is, however, sufficient to observe that in that case the mortgage was assigned to Girdlestone the trustee by the express direction of Madocks, the owner of the equity of redemption, and that the term was granted to Wright by that trustee, and also by direction of Madocks.

In *Watts v Symes* (a), A mortgaged first to B, and secondly to C, and then agreed to sell to D. D paid off the first mortgage at A's request, and A agreed that when the sale was complete, D should stand in place of B the first mortgagee; D was held entitled to B's security, the debt not being extinguished. *M'Kenzie v. Gordon* (b) was a strong case.—[His Lordship here adverted to the facts of that case.]—And Lord Cottenham there says:—"If a subsequent incumbrancer advance money, and it is part of his contract that he shall have an assignment of the prior incumbrance, then he is entitled to stand in the place of that incumbrancer whose debt is paid off by the money which he advances, and whose incumbrance he procures to be assigned to himself." That doctrine seems applicable to the facts in the present case; and accordingly I am of opinion that the plaintiff's exceptions on this point must be overruled.

I have now to dispose of the plaintiff's claim to priority as against the judgments of 1819. My opinion remains the same as that which, along with Mr. Justice Crampton, I, when Chief Justice, certified in a case, *Colyer v. Marnell* (c), sent to the Court of Queen's Bench by this Court. I, therefore, am of opinion, that the mortgage of 1825, and the sub-mortgage of 1841, ought to have priority over the judgments of 1819; but I think that, in deference to the decision of my predecessor, in *Hickson v. Collis*, and in the conflict of judicial opinions on this subject, I ought not to act on the opinion, although

(a) 1 De Gex, M'N. & G. 240.

(b) 6 Cl. & Fin. 875.

(c) 10 Ir. Law Rep. 353.

I express it; and therefore *pro forma* I decree in favour of the judgment creditors.

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Mr. *F. Fitzgerald*, for the sub-mortgagee, reminded the Court that his client stood in a better position than the mortgagee in reference to the judgment of 1819, and that inasmuch as he understood the Court to be with him on that point, he had not pressed it as much as he otherwise would have done.

The LORD CHANCELLOR said that at present he did not see how he could draw any distinction between the case of the mortgagee and that of the sub-mortgagee; but that he would consider the matter, and perhaps have the case further argued upon that point.

On this day the LORD CHANCELLOR said that, on consideration, he thought that the opinion which he had expressed in favour of the sub-mortgagee, in the progress of the argument, was right, and that he was protected by the Re-docketing Act.

Nov. 29.

[Subsequently to the resignation of the Great Seal by Lord Chancellor Blackburne, a petition of re-hearing was presented in this cause, and it was upon this day argued upon the first question only, before his successor the Right Hon. MAZIERE BRADY.]

1853.  
April 27.

The LORD CHANCELLOR.

I have considered this case, and I have been furnished with a report of the judgment of my predecessor. Upon reading it, I do not see any reason to doubt the soundness of the decision to which he came. His judgment treated this mortgage of 1820 as still subsisting for the benefit of the annuitant, and as affecting the lands of Scart only. At least I do not find in his judgment any allusion to the point made upon the allegation that the mortgage embraced other lands, or to the form of the deed of the 8th of November 1830; nor that, whatsoever may have been their intention, the parties had so dealt with the securities as to extinguish the mortgage in the

April 28.

1853.  
*Chancery.*  
**WALCOTT**  
*v.*  
**CONDON.**  
*Judgment.*

equity of redemption. This case has been argued very fully upon the authorities. The principle seems to be well established, that where the owner of the inheritance takes an outstanding security, it is considered as taken for himself and for his own benefit, and cannot be set up as a subsisting incumbrance against other incumbrances. But it is also settled, as laid down in *M'Kenzie v. Gordon* (a), that if a subsequent incumbrancer advance money, and it is part of his contract that he shall have an assignment of the prior incumbrance, then he is entitled to stand in the place of that incumbrancer whose debt is paid off by the money so advanced, and whose incumbrance the new lender procures to be assigned to himself. That was a case presenting more difficulty than the present case. It was, upon the evidence there, very uncertain out of what funds the prior incumbrances had been paid off. It was contended that they had been paid by the owner Mr. Macleod, or rather by Mr. Dallas and Mr. Inglis, as trustees for him. Lord Cottenham, however, did not consider them trustees for Macleod, but was of opinion that the parties advancing the money put it *in medio*, not in the possession of the debtor Macleod, but under the control of Dallas and Inglis, and in trust until it could be applied for the purpose for which it was intended, namely, buying up the prior incumbrances, which were to be assigned to the new creditor, and that they never had been the property of Macleod. It is plain from that and other cases, that where the subsequent incumbrancer advances his money, and it is part of his contract that he is to have the benefit of the anterior security, it may be legally done. The question is whether that has been done here, and how it may be accomplished? Here, Ferguson had £565 to lend; James Condon needed it; Delmege had a charge upon James Condon's estate, upon which that sum was due. It was perfectly allowable for Ferguson to stipulate for the protection of that security, and the Master finds "that James Condon, jun. had, on the death of James Condon, sen. (the mortgagor), become entitled to his estate in the lands of Scart; and in October 1830 applied to David Ferguson for the sum of £565 to be paid to Delmege, being the sum due on foot of the

(a) 6 Cl. & Fin. 875.

mortgage, in order that an annuity or rentcharge of £66. 7s. 9d. might be *effectually granted* to the said David Ferguson, charged upon, and payable out of, all the said mortgaged premises." The report does not find by whom that annuity was to be granted; but it is not a violent presumption to suppose that it could, as to the other lands included in the mortgage of 1820, as well as those of Scart, have been effectually granted only by the party representing the interest of the mortgagee, and therefore that, for that purpose, the mortgage should be kept alive. The deed of the 7th November 1830 is executed by Delmege. It is not a conveyance in express terms for James Condon. It does not contain a single word indicating a trust for him or anybody else. It is executed in favour of Richard Smith Condon, and recites that the consideration money was paid by him "and others for his use and on his account." This conveyance keeps the mortgagee's interest distinct from the equity of redemption. It is not in any respect like the conveyances in *Parry v. Wright* and *Toulmin v. Steere*. The circumstances of those cases left no room for a doubt to fasten on; but one of the *dicta* of Sir William Grant, in *Toulmin v. Steere*, has been questioned—namely, that there is express authority "to show that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice;" and, undoubtedly, if he meant to question the right of the lender to acquire a right to stand in the place of a prior incumbrancer, his observations could not be maintained.

*Parry v. Wright* has been more relied upon. The facts there more nearly correspond with those here, because it was the case of the transfer of a mortgage. But the instruments there failed to show an intention to keep alive the mortgage as a security. The mortgage debt was not assigned. The effect of the deed there was to show that the money was paid off, and then a conveyance was made of the dry legal estate. In truth, Wright took *de novo* a security by way of annuity, not protected by the mortgage, or any part of it, but by the dry legal estate alone. That is very different from what we have here. Not a word is said of the money having

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been paid by James Condon. The debt has been kept alive, and neither in form or substance is the mortgage extinguished. The fact is that the money was not paid by James Condon, but was paid by Ferguson to Delmege himself. Can I say, consistently with these facts, that it was not the intention of the parties that the mortgage should continue as a subsisting security? I conclude, on the contrary, as did my predecessor, that the intention was that the mortgage should so continue.

As to the deed of the 8th of November 1830, if it had been a transfer of the mortgage, no person could make any objection to it. It is a conveyance in which James Condon and R. S. Condon join in granting the annuity, *i. e.*, R. S. Condon grants the annuity out of the legal estate, and James Condon confirms that grant out of the equity of redemption. If a mortgagee choose to give an advantage to an annuitant, and join in the deed of grant, I see no objection to it. If that were done by a suitable form of conveyance, it could not be said to confer any legal rights on the intermediate creditors. The mortgagee alone could grant the annuity out of the legal estate, and the mortgagor may concur in the grant. I do not see, if it be done by proper forms, how it could confer any rights on intervening creditors. It must come to this, that the intermediate creditors could come in and file a bill claiming the benefit of the annuity, on the ground that the mortgage was extinguished. I know not of any authority for that proposition. I can understand that where the owner in fee pays off a prior incumbrance, and takes an assignment to, or in trust for, himself—that might, as in *Toulmin v. Steere*, have the effect of extinguishing the mortgage. But were that doctrine to be extended to a case like this, where it is necessary for the safety of a new creditor that the mortgage should be kept alive—such an argument would seem to strike at the ground-work of the common case where a mortgagee in fee grants a lease, and the mortgagor confirms the grant. I have never found that the mortgage was gone, to the extent of the land demised, and the rent reserved on that demise. Take the case of a first mortgagee and a mortgagor joining in a new security to a party making a new advance to the mortgagor, who partly thereby pays off the original mortgage; that

would not extinguish it. I have looked at precedents of such leases, and of further advances, where the mortgagor and mortgagee grant to the same person, in order to secure a consolidated sum. It has never been argued that the original mortgage was thereby lost. Neither in the case of a lease, nor of such a new mortgage as I have adverted to, could the original mortgage be affected by such a conveyance.

I think an intention existed which required that the mortgage should subsist, and I do not perceive that any thing occurred to defeat that intention in the forms adopted here.

I do not think that this case falls within either *Parry v. Wright*, or *Toulmin v. Steere*.

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*Chancery.*  
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*Judgment.*

FEARON v. FEARON.

1852.  
May 12, 13,  
14.

By articles of agreement, dated the 13th of February 1830, and entered into previously to the marriage of Robert Fearon with Margaret Eliza Saunders, reciting that he was entitled to an undivided fourth part of several houses in the city and county of Dublin, for certain terms for lives and years; and that his intended wife was seised of a vested remainder in tail in an undivided fifth part

By marriage articles, Blackacre, the property of the wife, was limited to the husband and wife for their lives and the life of the survivor of them, with

remainder, subject to a term to secure portions of £1000 for younger children of the marriage, to the first and other sons of the marriage, in tail; and Whiteacre, the property of the husband, was settled upon the husband and wife and the survivor of them for their lives, with power for the survivor to appoint Whiteacre to any one or more of the children of the marriage; and in default of appointment, equally amongst them. The wife died first, leaving a son and a daughter. The husband, by his will, devised and appointed Blackacre to the son, and devised, limited and appointed Whiteacre to the daughter for her life, with remainder to the son, in case he should survive her; and declared it to be his intention that "the bequest to her should be taken as and for any sum or claim she might have under and by virtue of his marriage settlement, or any other deed executed by him." *Held*—That the daughter was bound to elect between the £1000 portion and the benefit given her by the will.

There is not any authority for the proposition, that a case for election can only be raised where the property conferred upon a person, in lieu of that to which he would otherwise be entitled, must be the absolute property of the giver; an appointment, under a power vested in him, is sufficient to compel the appointee to elect.

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*Chancery.*  
**FEARON**  
*v.*  
**FEARON.**  
*Statement.*

of certain lands in the county of Fermanagh, expectant upon the decease of her father, and to an undivided fourth of an undivided fifth of lands whereof her father was tenant by the courtesy—it was covenanted that the above-mentioned property of the intended wife should be settled upon trust for her father for life, and after his decease for Robert Fearon and his intended wife, during their joint lives and the survivor of them, for life; with remainder to trustees for five hundred years; with remainder to the first and other sons of the marriage successively in tail male; with remainder to the daughters, as tenants in common in tail; with cross remainders between them; with remainder, if there should be but one daughter, to her in tail; with remainder to the intended husband, in fee. And as to the husband's property, it was covenanted that it should be settled to the husband and wife during their joint lives, and to the survivor of them; and after the decease of the survivor, for any one or more of the children of the marriage as such survivor should by deed or will appoint; and, in default of appointment, in equal shares amongst them. The trusts of the term of five hundred years in the Fermanagh estates were, that in case there should be one or more children besides an eldest or only son, the trustees should, by lease, sale or mortgage, and by the rents and profits in the meantime, until such lease, sale, &c. (except what should be applied for the maintenance of such younger children), raise a sum not exceeding £1000 for portions for such child or children, not being an eldest or only son, to be paid in such shares or proportions as the intended husband and wife, or the survivor of them, should appoint, by writing under hand and seal, attested by two or more witnesses; and, in default of appointment, then to be paid—if but one such child—to such only child at his or her age of twenty-one, or marriage; and if two or more such children, then equally amongst them; and upon further trust, to raise out of the rents and profits such yearly sum for the maintenance of such younger child or children as to the trustees should seem meet; but not exceeding the annual interest at £6 per cent. upon the portions.

The marriage was duly solemnised. The father of Mrs. Fearon died on the 9th of March 1830. A settlement, pursuant to the

articles, was, upon the 29th of June 1830, executed by the parties.

Margaret Eliza Fearon died in the lifetime of her husband Robert Fearon. The power jointly to appoint the sum of £1000 was not exercised by her and her husband ; but he, by his will, dated the 18th of October 1845 (and attested by two witnesses), thereby gave, devised, bequeathed and appointed, all his right, title and interest, which he derived under his marriage settlement or otherwise (as settled and limited by a deed of partition directed by a decree of the Court of Exchequer) in the above-mentioned freehold hereditaments in the county of Fermanagh, to his son Robert William Fearon. And the testator further gave, devised, limited and appointed, the houses which he was possessed of, or entitled to, in the city and county of Dublin, to his daughter Catherine Anna Fearon, for her natural life, with remainder to his son Robert William Fearon, in case he should survive her, with remainder, in case of his death in her lifetime, to the testator's then wife Frances Annabella Fearon. And the testator declared it to be the purport and intention of his will, that the bequest to his daughter Catherine Anna was to be taken and received by her as and for any sum of money or claim she might have under or by virtue of his marriage settlement, or any other deed executed by him ; and after giving to his son Robert William Fearon certain specific legacies, the testator devised and bequeathed any other property, real or personal, which he might die seised or possessed of, to his wife Frances Annabella Fearon, including in that devise the remainder in fee to which he was entitled in the lands of Fermanagh, contingent on the death of his children without issue or under twenty-one years of age ; and he appointed his wife his executrix and guardian of his children, and empowered her to retain £100 per annum for the maintenance of his son, and £35 for that of his daughter, during their minorities, out of the rents and profits of the properties bequeathed to them respectively.

The testator died shortly after the execution of his will, and was survived by Robert William Fearon and Catherine Anna Fearon, who were the only children of his marriage with Margaret Eliza Saunders.

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—  
*Statement.*

1852.  
*Chancery.*  
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*Statement.*

A cause petition, under the 11th section of the Chancery Regulation Act, was filed on behalf of the testator's daughter Catherine Anna Fearon, who was a minor, by her next friend. By it she claimed to be entitled, under the marriage articles and settlement, to a vested interest in the sum of £1000 provided for younger children, payable at twenty-one or marriage, and to interest upon it at £6 per cent. from the date of her father's death, to be paid out of the rents and profits of the Fermanagh estate, for her maintenance and education; and also under the marriage articles, settlement and will, to a life estate in the houses in the city and county of Dublin. She also alleged that the appointment made by the testator of those houses to his wife was void, inasmuch as she was not an object of the power, and that upon his death those houses became absolutely vested, as in default of appointment, in the petitioner and Robert William Fearon, in equal shares as tenants in common, subject to her life estate; and that the condition in the will annexed to the bequest of that life estate to the petitioner was void. That on behalf of her brother it was alleged that she was bound to elect between the provision made for her by the will, and the £1000 portion provided by the marriage articles and settlement.

*Argument.* Mr. *Francis A. Fitzgerald* and Mr. *Gresson*, for the petitioner. The appointment to the testator's daughter of a life estate in the houses is good, but the condition annexed to it, that she shall abandon all claim to the portion to which she is entitled under the marriage articles, is void: *Alexander v. Alexander* (a); *Sadler v. Pratt* (b); *Blacket v. Lamb* (c). It will be said that she must elect between the portion and the benefit given to her by the will; but the doctrine of election is only applicable where a man endeavours to enforce a disposition of property not his own, by giving to the persons entitled thereto other property of his own: *Bristow v. Ward* (d). There is an absolute appointment here, in the first instance, and therefore, no case of election is raised:

(a) 2 Ves. sen. 644.

(b) 5 Sim. 644.

(c) 16 Jur. 142; 21 L. J., N. S., 46; S. C. since reported in 14 Beav. 482.

(d) 2 Ves. Jun. 336, 350.

*Carver v. Bowles* (a). The wife, of course, cannot take any interest in the houses. The case of *Roberts v. Dixwell* (b) was also mentioned.

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—  
Argument.

Mr. Serjeant *Christian* and Mr. *John Pennefather*, for the testator's son Robert William Fearon.

It cannot be denied that the wife does not take any estate in the houses under the will. But with respect to the son, there has not been any fraud upon the power. It would have authorised an exclusive appointment of the houses to the son. The only restriction upon the donee was, that he should limit his exercise of it to the objects of the power; but he might have attached any condition which he pleased to an appointment so confined. There is not any authority for saying that a case for election can only be raised where the property, given in lieu of that to which the party would otherwise be entitled, is absolutely that of the testator himself. At all events, a power of appointment is considered as the property of the donee, and may, as such, be released or extinguished: *West v. Berney* (c); *Cunynghame v. Thurlow* (d); *Smith v. Death* (e). In *Stewart v. Marquis of Donegal* (f), Lord St. Leonards, speaking of the power incident to the estate of a tenant for life, says:—"Like all powers for the benefit of a man's family over his settled estates, it was in the nature of a benefit to himself." Here the condition was for the benefit of the other object of the power; and if the petitioner claim the £1000 portion out of the Fermanagh estates, she must abandon her life estate in the Dublin houses, or, at all events, in so much of that estate as is equal to the injury inflicted upon the Fermanagh estates by her retaining the portion charged upon them. *Roberts v. Dixwell* supports this proposition.

The LORD CHANCELLOR.\*

This was a special case, for the decision of a question arising on

May 14.  
Judgment

(a) 2 R. & Myl. 304, 308.

(b) *West's Cas.*, temp. Har., 536; S. C. 2 Sug. Pow., App., 16;  
S. C. 2 Eq. Cas. Abr. 668, pl. 19.

(c) 1 Russ. & Myl. 431.

(d) 1 Russ. & Myl. 436, n.

(e) 5 Mad. 371.

(f) 2 Jo. & Lat. 636, 657.

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*Chancery.*  
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**FEARON.**  
*Judgment.*

the construction of the will of Robert Fearon. On his marriage in 1830, articles were executed by which an estate in the county of Fermanagh was agreed to be settled on him and his wife for their lives, and the life of the survivor, with a term of 500 years, to raise £1000 for younger children, and subject thereto to the use of the first and other sons of the marriage in tail. Estates in the county and city of Dublin were settled in the same way on him and his wife, for life, with power to the husband, in the events which happened, authorising an exclusive appointment to any of the children of the marriage, and, in default of appointment, to be equally divided between them; the wife died: there were two children of the marriage, a daughter, who is the petitioner, and a son, who is the defendant. Robert Fearon made a will, on the construction and effect of which I am called on to decide. The plaintiff claims under this will to be appointee, for her life, of the Dublin estate; and claims under the settlement, as the only younger child, the sum of £1000. The defendant contends that she is bound to elect, and that if she elect to take under the will, the rents of the estate limited to her for life shall be sequestered until a sum of £1000 is raised, to be applied in exoneration of the defendant's estate in the other lands from the charge of £1000. The will is:—[Here his Lordship read the material parts of the will.]

The defendant insists that the plaintiff should elect between the estate given her by the will and the charge of £1000 under the settlement. To this the plaintiff's Counsel reply, that, as the devise was a devise of lands, over which the testator had but a power, it was not competent to the Court to apply the doctrine of election, as it could and would have done if these lands were his own property. I cannot discover any authority, or any definition of the rule of election, that can warrant me in narrowing that definition, and excluding from its operation a case in which the donee of the power has full right by virtue of it to confer the estate which he intends and professes to dispose of; the power to appoint is derived from the original right of property, preserved and modified by the instrument which contains it; and as to the intention of the party who appoints, it is the same, whether it be effectuated

through the medium of a power or that of property. But what is most important, in considering the question before me, is, that the person who now impugns and frustrates the intention of the testator, does so, in the same degree and to exactly the same extent, where the instrument executes a power, as where it acts as a disposition of property. It may be well to refer here to one or two of the cases in which the nature of this doctrine is laid down. Lord Redesdale, in *Moore v. Butler* (a), cites from a note of a case before Lord Rosslyn, as follows:—"No person puts himself in a capacity to take under an instrument without performing its conditions, and they may be express or implied; if it is stated, or can be collected that such was the intention of the parties to the instrument, that intention must be complied with." Lord St. Leonards, in the *Treatise on Powers*, p. 142, says:—"The foundation of election is, that no one can claim under and in opposition to the same instrument." These definitions are so wide and general as to prevent the limitation of the doctrine in the manner contended for by the petitioner. It is, however, well established by the authorities cited in the argument, as by the others, that neither by express or constructive condition can the donee of a power divert the fund from its proper objects and bestow it on a stranger. But this is not done, nor attempted, in the case before me; on the contrary, the very same purpose, which will be effected by applying the doctrine of election, might have been effected by what this Court will uphold as a due exercise of the power: for instance, had the testator directed that the rents of the Dublin estate should be enjoyed by his son until he should have received £1000, there is abundant authority to show that this, as a devise of a charge on the estate, would be a valid exercise of the power to appoint the estate itself. Now, it is obvious that in substance the same thing is done when the testator gives his daughter a life interest in the Dublin estate, her enjoyment of which is to be cut down by her obligation to release her charge of £1000 in favour of her brother, in whose favour, as I have said, an equal sum might have been charged on the estate appointed to her.

1852.  
*Chancery.*  
FEARON  
v.  
FEARON.  
Judgment.

(a) 2 Sch. & Lef. 287.

1852.  
*Chancery.*

FEARON  
v.

FEARON.

*Judgment.*

Having regard to the contingent limitations over, and the events on which they may vest, if the Master shall find that it will be for the petitioner's benefit to take under the will, it will be necessary to retain in Court the monies that are to be levied out of the estate devised to the petitioner, to abide such order as in those events it may be right to make; for it is obvious, that a question very different from that before me may arise, when and if a stranger to the power shall make a claim to the accumulated fund, on the ground of election.

Refer it to William Henn, Esq., the Master in the matter of *Fearons minors*, to inquire and report whether it will be for the benefit of the minor petitioner, Catherine Anna Fearon, that she shall take under or against the will of her father Robert Joseph Fearon, deceased, in the petition named. Reserve the question of the costs of this matter, with liberty to the parties to apply, on the return of the report, as they may be advised.

6 *Reg. Lib. Gen. f.* 115, 118.

May 25, 26,  
27.

#### MORIARTY v. MARTIN.

A testator having, under his marriage settlement, a power of appointing a

sum of £1500 amongst his children (which sum was, in default of appointment, to be divided amongst them equally), and having only two sons, H. and W., appointed to his son H. £1, and to his son W. £1; and as to the residue, appointed the same to his son W., adding:—"I request him to have the same invested on mortgage or in the purchase of lands, and settled on himself for life, with remainder to his child or children as he may appoint, with remainder to such child or children of my son H. as he may appoint, with remainder to my own right heirs." The testator, out of his own property, conferred by his will other benefits upon W. *Held*—That W. was bound to elect between his rights under the settlement and his rights under the will.

W. having, during his lifetime, done acts which were held to amount to an election to take under the will, and having died without children, *Held*—That the precatory words, contained in the will, constituted a valid trust in favour of the children of H., although they were not objects of the power contained in the settlement.

*Blacket v. Lamb* (16 Jur. 142; S. C. 21 L. J., N. S., 46, and 14 Beav. 482) commented on.

*Carver v. Bowles* (2 Russ. & Myl. 304) considered.

in the county of Limerick, was assigned by the intended wife to trustees, upon trust to pay the yearly interest and dividends to herself during her life for her separate use, and after her death to Sir Thomas Moriarty during his life, and after his death and that of his wife, upon trust to pay the principal and interest to such of the children of the marriage, and in such shares and proportions, as Sir Thomas Moriarty should by will appoint, and in default of appointment, equally amongst them. That settlement contained a stipulation that in the event of Sir Thomas Moriarty thereafter being able to make a secure settlement, equivalent in amount to what was settled by the indenture of 1805, then, in case of his making such settlement he should be at liberty, with the consent of the trustees, to call in and receive the said sum of £1500, and that the equivalent should be settled upon the same trusts as those of the settlement of 1806.

In 1816, Sir Thomas Moriarty did purchase lands in Roscommon, which were then, and continued to the time of his death, subject to debts to the amount of £1350.

By his will, bearing date the 28th of June 1837, Sir Thomas Moriarty devised his freehold estates in Roscommon and elsewhere to trustees, upon trust to pay to his wife an annuity of £50 per annum during her life, in lieu of dower or thirds, but in addition to her rights under the marriage settlement of 1805, or under the will of her father Anthony Lee; and upon further trust, to pay an annuity of £50 per annum to his (the testator's) son William Moriarty, during the life of the testator's wife; and upon further trust (subject to those annuities), for the testator's son Henry Moriarty for life, in satisfaction of any claims he might have had under the marriage settlement of 1805; and after his decease, for his first and other sons in tail male, with remainder to the testator's son William Moriarty for life; with remainder to his first and other sons in tail male, with remainder over. And the testator, after reciting the power contained in the settlement of 1805, authorising him to appoint the £1500, which constituted the portion of his wife, amongst the children of the marriage, in such shares as he should direct, proceeded thus:—  
“Now therefore, pursuant to, and by force and virtue and in exer-

1852.  
*Chancery.*  
MORIARTY  
v.  
MARTIN.  

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Statement.

1852.  
*Chancery.*  
**MORIARTY**  
*v.*  
**MARTIN.**  


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*Statement.*

cise and execution of the power and authority to me for this purpose given by the said recited indenture of settlement, and of every power or authority in anywise enabling me, I hereby give and appoint to my eldest son the said Henry Moriarty the sum of £1, to my son William Moriarty the sum of £1; and as to all the rest, residue and remainder of the principal money of the said portion, so as aforesaid charged upon the Royce estates, I give and appoint the same to my said son William Moriarty, and I request him to have the same, when paid out of the produce of the sale of the estate charged therewith, vested in good real security by mortgage, or in the purchase of real estates, and settled to the use of himself for his life, with remainder to his child or children, as he may appoint, with remainder to such child or children of my eldest son Henry Moriarty as my eldest son shall appoint, with remainder to my own right heirs."

Sir Thomas Moriarty executed on, the 26th of July 1837, the following codicil to his will:—"Whereas, by marriage settlement I am empowered, with the consent of the trustees therein named, to receive my wife's fortune whenever I shall make an equivalent settlement: now it is my will, that if the trustees will consent to have said money raised and applied in discharge of such debts, incumbrances or charges as my estates are now liable to, in case such be necessary to prevent a sale thereof, and that the sum so applied shall bear legal interest, and be subject to the uses and trusts of said marriage settlement during the life of my wife Dame Elizabeth Moriarty, and after her death subject to the uses, trusts or limitations as set forth in my said will and testament."

Sir Thomas Moriarty died without revoking or altering the above will and codicil. He left his wife Lady Moriarty and two sons, Henry and William, surviving him.

William Moriarty afterwards married, and died in 1844 without issue; but by his will, bearing date on the 5th of November in that year, bequeathed all the property to which he was entitled, in possession, expectation or reversion, to his wife Catherine for her life. That will was proved in the Diocesan Court of Chester by Henry Fisher.

Henry Moriarty had two children, Clarinda and Thomas, both infants.

Henry filed the bill in this suit, praying (*inter alia*) a declaration of the rights of all parties in respect to the sum of £1500, and claiming an absolute interest in a moiety of it.

The defendants Catherine Moriarty and Henry Fisher, by their answer, insisted that the clause in the will of Sir Thomas Moriarty was precatory only, and did not create a trust; and that William Moriarty took an absolute interest in the whole of the £1500, except the nominal share appointed to the plaintiff Henry Moriarty: and that even if the will did purport to create a trust for the grandchildren of Sir Thomas Moriarty, it was as to them an excessive execution of the power in the settlement of 1806; and that the appointment in the will to William Moriarty only was valid, and the subsequent directions constituted a condition separable from the gift to William, and were void.

Mr. *Francis A. Fitzgerald*, and Mr. *John E. Walsh*, for Catherine Moriarty and Henry Fisher.

The appointment to the grandchildren of Sir Thomas Moriarty was not authorised by the power: *Robinson v. Harcastle* (a). It will be said that William Moriarty was bound to yield to the will in all respects, or to take against it. But this is not a case of election: these precatory words cannot be held to create a trust for the grandchildren. There is in the first instance a direct gift to William Moriarty, and the precatory words merely amount to a superadded condition, which, being in excess of, and inconsistent with the power, is void, and the prior gift to William Moriarty alone is good, and constitutes an absolute appointment to him: *Blacket v. Lamb* (b); *Carver v. Bowles* (c); *Kampf v. Jones* (d).

Mr. *Hughes* and Mr. *Deasy*, for the minors Clarinda and Thomas Moriarty, and for Lady Moriarty.

(a) 2 Bro. C. C. 314.

(b) 16 Jur. 142; S. C. 21 L. J., N. S., 46; since reported 14 Beav. 482.

(c) 2 Russ. & Myl. 304, 308.

(d) 2 Keen, 756.

1852.  
*Chancery.*  
MORIARTY  
v.  
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Statement.

Argument.

1852.  
*Chancery.*  
 MORIARTY  
 v.  
 MARTIN.  
 —  
*Argument.*

Lord St. Leonards, in the *Treatise on Powers*, vol. 2, p. 150, 7th ed., disapproves of the opinion of Lord Thurlow in *Robinson v. Hardecastle*. The general principle attributed to Sir J. Romilly, M. R., in *Blacket v. Lamb*, that the donee of a power may not impose a condition, if he purchase the right to do so, by giving the objects of the power a benefit *aliunde*, cannot be supported. In *Kampf v. Jones*, the question of election was not raised. It would be superfluous to cite authorities to show that these precatory words must be considered as imperative, and, therefore, tantamount to an express condition.

Mr. Serjeant *Christian* and Mr. *Lawless*, for the plaintiff, said that if the Court decided that William Moriarty was not bound to elect, it would be necessary for them to argue that under the appointment to him he took only a life interest in the sum of £1500.

The LORD CHANCELLOR.\*

*Judgment.*

This bill prays a declaration of rights as to the sum of £1500, settled on the marriage of Sir Thomas Moriarty in the year 1805. The settlement gave Sir Thomas Moriarty a power to dispose of the £1500 amongst his children: having two sons, he by his will appointed £1 to his son Henry, £1 to his son William, and, as to the residue, appointed the same to his son William, adding—"and I request him to have the same invested on mortgage or in the purchase of lands, and settled on himself for life, with remainder to his child or children as he may appoint, with remainder to such child or children of my eldest son Henry as he may appoint, with remainder to my own right heirs." He bequeaths an annuity charged on lands, to William, for the life of his mother, who is still alive: it is plain that the limitations of this will in favour of the children of William or Henry are not warranted by the power; and it is contended by the defendant that the appointment to William gave him the absolute right to the sum of £1498, and that the words of request which follow the absolute devise to him have no opera-

\* The Right Hon. FRANCIS BLACKBURNE.

1852.  
*Chancery.*  
MORIARTY  
v.  
MARTIN.  

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Judgment.

tion. If these words of request were intended to leave it optional, and at the discretion of William, whether he should give effect to it or not, the consequence will plainly be what the defendant contends for. But I think it is impossible, in opposition to the vast body of authority on the subject, to doubt that they are imperative; nor can I, in the absence of authority, hold that the same words are to be understood in a different sense when the subject of the disposition is property over which the testator has only a limited power of disposition, from that which is their established construction and effect when the subject is property of his own. The evidence of intention which is to govern in both cases is the same. The rule of construction applicable to this class of cases is stated by Lord Truro, in the case of *Briggs v. Penny* (a), thus:—"I conceive the rule of construction to be, that words accompanying a gift or bequest, expressive of confidence, or belief, or desire, or hope, that a particular application will be made of such bequest, will be deemed to import a trust on these conditions: first, that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not; secondly, the object must be certain; and thirdly, the objects expressed must not be too vague or indefinite to be enforced." And in *Malim v. Keighly* (b), Lord Alvanley says:—"If a testator shows a desire that a thing shall be done, *unless there are plain words or necessary implication that he does not mean to take away the discretion*, but intends to leave it to be defeated, the party shall be considered as acting under a trust." If these rules are applicable to the present case, as I think they are, this must be considered a case of election; and William was bound either to give effect to the trusts, or, if he refused to do so, to make compensation to the disappointed legatees out of the annuity given to him.

The case of *Blacket v. Lamb*, as reported in the *Jurist*, was relied on by the defendant. It is there explicitly stated by Sir John Romilly, M. R., that if the words amounted to a direct appointment to the grandchildren, the case would have been one of election; but he *considered* that the words there had not that effect, and that they

(a) 3 Mac. & Gor. 554.

(b) 2 Ves. jun. 335.

1852.  
*Chancery.*  
**MORIARTY**  
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**MARTIN.**  
*Judgment.*

were to be treated as a superadded condition, and rejected as void. In this view of the case, the Master of the Rolls is reported to say that the case of *Carver v. Bowles* was material: whether this construction was right or not, I do not undertake to say; for the words of the clause before me make the trust a substantive portion of the bequest to William, and warrant the application of the doctrine of election. I may, however, say of the report of the judgment in *Blacket v. Lamb*, that I suspect there is some inaccuracy in it, in attributing to the Master of the Rolls the assertion that the case was similar to *Carver v. Bowles*; for the words, "so far as I lawfully or equitably may or can order or appoint," used in that case, showed that the testator intended to do no more than execute his power. These important words, as has been observed, are printed in italics in Lord St. Leonards' work on Powers (vol. 2, p. 150, 7th ed.), and must have been the ground for rejecting the superadded provision. So in the case of *Church v. Kemble* (a), a similar reference to the power, and the words "in case I have power so to do," were held totally to avoid a disposition to persons not objects of the power.

I may further remark that, if the words superadded in *Blacket v. Lamb* amount, as the report says, to a condition, I cannot see how the appointee could have taken benefits under the will, and refused to perform the condition.

The part of the decree relating to the question of election was as follows:—

Declare that the late William Moriarty was bound to elect between his rights to so much of the estate and interest in the said sum of £1500 as was not appointed by the will of Sir Thomas Moriarty to any object of the power conferred by the settlement of 1805, and the benefits conferred upon him, and the estates and interests given to him by the said will of Sir Thomas Moriarty. And it appearing to the Court that the said William Moriarty in his lifetime elected to take the estates and interests given to him by

(a) 5 Sim. 525.

the said will, instead of resorting to his rights under the settlement; declare, that subject to the said life estate of the said Lady Elizabeth Moriarty, the infants defendants, Thomas Moriarty and Clarinda Moriarty, are entitled to the said principal sum of £1500, subject to the power of appointment conferred upon said plaintiff by the said will of Sir Thomas Moriarty, &c.

6 *Reg. Lib. Gen. f.* 61, 63, 139, 165, 166, 167.

1852.  
*Chancery.*  
MORIARTY  
v.  
MARTIN.  
*Judgment.*

In re WILLIAM RYAN, a Bankrupt.\*

(*In Bankruptcy.*)

1853.  
*Bankrupt Court.*  
May 23, 24.  
June 2.

In this case, which came before the Court on charge and discharge, the trustees of the bankrupt's children claimed a statutable mortgage over the bankrupt's landed property, in priority to all the other creditors, under the following circumstances:—

On the 23rd of November 1850, Messrs. Kernan and Treacy (the trustees) obtained from William Ryan, the bankrupt, a bond and warrant for the principal sum of £480, on which they entered judgment on the same day; and on the 6th of December, Mr. Treacy, one of the trustees, made an affidavit, for the purpose of converting

In order to constitute a fraudulent preference, it is not sufficient that a payment or security was voluntary, and made at a time when the trader was in insolvent circumstances. It is necessary to show that it was made in contemplation of bankruptcy.

A judgment obtained against a bankrupt, and registered as a mortgage, under the 6th and 7th sections of the 13 & 14 *Vic.*, c. 29, before the issuing of the commission, is a charge on the bankrupt's lands, in priority to his simple contract debts.

The 13 & 14 *Vic.*, c. 29, thus repeals the 126th section of the 6 *W.* 4, c. 14, the leading Irish Bankrupt Act.

*Quære.*—Whether an affidavit made by one only of several conuzees is a sufficient compliance with the terms of the 6th section?

\* Reported by LESLIE S. MONTGOMERY, Esq.

1853.  
Bankrupt  
Court.

In re  
RYAN.

Statement.

the judgment into a mortgage, under the 6th and 7th sections of the 13 & 14 Vic., c. 29, and on the 11th of December registered that affidavit in the manner required by the Act. On the 29th of August 1851, a commission of bankruptcy issued against Ryan, his trade debts at that time amounting to about £1700. Some of the bankrupt's landed property was subsequently sold in the Court of Bankruptcy, and realised a sum of £900.

The trade assignees charged that, prior to giving the bond, the bankrupt had committed an act of bankruptcy, by keeping out of the way of the service of a writ of summons; that at the time of executing the bond, the bankrupt was in insolvent circumstances, and that Messrs. Kernan and Treacy were well aware of that fact; that there was no consideration for the bond, but that it had been executed by the bankrupt voluntarily, and as a fraudulent preference, and with a view to provide a benefit for his children, in the case of his bankruptcy, to the prejudice of his *bonâ fide* creditors. Messrs. Kernan and Treacy, in their discharge, stated that, even assuming the truth of the allegations as to bankrupt's insolvency at the time of the execution of the bond, they were wholly ignorant of such facts at the time; that they had been for many years the bankrupt's solicitors, and did, up to November 1850, and for some time subsequently, believe Ryan to be a solvent and wealthy man; and that in the month of December 1850, he appeared to be in good credit, some of his creditors having then taken his acceptances at three and six months.—[The discharge then set forth the circumstances under which the bond was executed, as they appear in the bankrupt's affidavit.]—The bankrupt, in his affidavit stated among other matters that James Ryan, his brother, had by his will, bearing date the 16th of March 1837, bequeathed to the bankrupt's children a sum of £40 each, and had died on the 23rd of March in the same year; that he, the bankrupt, had at that time seven children, of whom four subsequently died; that this money had been invested in stock, which he subsequently sold out, and applied to the payment of his trade debts:—"Positively saith that at the time of executing such bond and warrant he believed himself to be perfectly solvent, and well able to meet all

his trade debts, and that he did not at the time of giving said bond contemplate bankruptcy or failure in his circumstances, and that he was then in good credit; and that he did not intend to give his children any undue preference; that the £480 was then due by deponent to his children, save such portions as may have come to him as next-of-kin to his four deceased children."

1853.  
*Bankrupt  
Court.*  
In re  
RYAN.  
Statement.

On the present argument it was contended, on behalf of the trade assignees—

First—That the judgment was totally void, and not a charge on the bankrupt's estate, having been given without any valid consideration, and as a fraudulent preference.

Second—That if the judgment were a charge, it could only be a charge on a level with the bankrupt's simple contract debts.

Mr. *Fitzgibbon*, for the trade assignees.

\* The giving of this bond and warrant was a fraudulent preference; they were passed without any consideration, at a time when the bankrupt's affairs were in an insolvent condition, and after the commission of an act of bankruptcy: *Abell v. Daniell (a)*.

Argument.

But even assuming that this was a judgment given for value, and that there could be no impeachment of it, and that the registration was complete, the question then is, was this a mortgage over all the landed property of the bankrupt mentioned in the affidavit? This is a new question of law, arising upon the construction of the 7th section of the 13 & 14 Vic. c. 29. In framing that section, the 126th section of the 6 W. 4, c. 14, appears to have been overlooked; but it would be a great misapplication of this 7th section to apply it to the case of a trader subject to the bankrupt laws. If the Legislature had meant to repeal the 126th section, they would have said so. The words of the 7th section exclude all cases under the 126th section of 6 W. 4. Can the trader then dispose of all his estate in lands, without accounting for it to his creditors? The 2 & 3 Vic. c. 29 (corresponding to the 3 & 4 Vic. c. 109, *Ir.*), which is more like a repeal of the 126th section, was held not to be so

(a) 1 M. & M. 370.

1853.  
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in *Shey v. Carter* (a). That case confirmed *Whitmore v. Robertson* (b). The authorities are collected in *In re Perrin* (c).

Mr. James Kernan, for the trustees.

This cannot be considered a fraudulent preference. There is no evidence that the trustees were aware of the insolvent state of the bankrupt's circumstances. The money due by the bankrupt to his children afforded a sufficient consideration for the bond. No doubt the bankrupt meant to give to his children a security for the money which he owed them; but the question is, did he mean to give them an undue or fraudulent preference? In order to prove a fraudulent preference, it should be shown that, at the time of giving the security, the bankrupt contemplated bankruptcy as a result which would necessarily follow from the pecuniary state of his affairs: *Atkinson v. Brindall* (d).

As to the question of law involved in this case. By 3 & 4 Vic., c. 105 (Pigot's Act), a judgment was made an actual charge upon lands. Before that Act, a judgment had no preference in bankruptcy; but one of the effects of Pigot's Act was, that if a judgment had been entered twelve months before an act of bankruptcy committed, that judgment was in the position of a mortgage, so far as that it was to be paid out of the landed property of the bankrupt. The 7 & 8 Vic., c. 90, provided that all *bonâ fide* judgments should have their preference. Such was the state of the law when the 13 & 14 Vic., c. 29, was passed. By that Act, all that portion of Pigot's Act (section 22), whereby judgments were made charges upon lands, was repealed, and a different right and a different remedy was given by the 6th and 7th sections. These sections contemplate the case of a party having a disposing power over his landed property, which he might exercise without the consent of any other person, for his own benefit. It cannot be said that the bankrupt here might not, for *bonâ fide* valuable consideration, have sold this

(a) 11 M. & W. 571; S. C. 7 Jur. 427.

(b) 8 M. & W. 463; S. C. 5 Jur. 1068.

(c) 4 Ir. Eq. Rep. 89, 862; S. C. 2 Dr. & War. 166.

(d) 2 Scott, 369.

property out and out; and, if so, he had a disposing power over his estate, which no one could have prevented him from exercising; and, consequently, this was an estate to which the judgment would attach. The Legislature must have intended the remedy under the 13 & 14 Vic., c. 29, as a substitute for the remedy under Pigot's Act. But by Pigot's Act, a judgment creditor was entitled to get the entire amount of his judgment.

1853.  
*Bankrupt  
Court.*  
*In re*  
RYAN.  
*Argument.*

*Mr. Fitzgibbon*, in reply.

**MR. COMMISSIONER MACAN.**

*June 2.*  
*Judgment.*

In this matter of William Ryan, the trustees of his children claim a lien, by statutable mortgage, over the entire of his landed property, in priority to all his other creditors. It is impossible to overrate the importance of the question thus raised. In this case, as in every case in bankruptcy where a particular creditor claims a preference over the rest, the dates are important. The last Judgment Act, the 13 & 14 Vic., c. 29—on which the principal question depends—came into operation on the 15th of July 1850; and some four months afterwards the bankrupt executed to these trustees his bond and warrant for the principal sum of £480, on which the trustees upon the same day entered judgment. On the 6th of December, Mr. Treacy, one of the trustees, made an affidavit for the purpose of converting the judgment into a mortgage, under the 6th and 7th sections of the said Act; and, on the 11th of December, the trustees, with commendable diligence, registered this affidavit in the office for registering deeds in Ireland.

The commission did not issue for nine months afterwards—namely, on the 29th of August 1851. The case comes before the Court now on charge and discharge, together with affidavits purporting to verify the general statements therein. But I may remark at once that, if the affidavit of the bankrupt be taken as conclusive, the question as to whether or not there was a fraudulent preference cannot arise, because he has in that affidavit negatived, in the most unqualified terms, every such allegation.

In this case the uniform practice of the Court has been departed

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from, in permitting the bankrupt to make an affidavit, when his examination had been adjourned *sine die*. If the bankrupt had been early subjected to a searching personal examination, and not afforded an opportunity of thus preparing his affidavit out of Court, the result might have been different. However, as it is, the affidavit must be taken into consideration.

To the claim of the trustees it is objected by the trade assignees that this bond and warrant were clearly a fraudulent preference, and that it is therefore utterly impossible that the party can derive any benefit from them in consequence of any registration under the said mortgage clauses. Accordingly, this will be the first question to be considered; for, if the Court should be of opinion that this was a fraudulent preference, then it will be unnecessary to decide the other question, namely, whether the judgment is to operate as a mortgage, or be cut down, like other judgments, to the level of simple contract debts? It was insisted, on the part of the assignees, first, that the bond was passed without consideration; and, secondly, that it was passed after a clearly established prior act of bankruptcy, and was altogether voluntary. I must say that the evidence here of a prior act of bankruptcy is not such as would have warranted me in adjudicating Ryan a bankrupt. It is very vague and unsatisfactory, and, as far as it goes to establish an act of bankruptcy at all, it is clearly an act subsequent to the date and execution of the bond. There is no vagueness as to the time; it is clear and distinct, and was several days after the entering of the judgment on the bond and warrant. As a proof of the unsatisfactory character of this evidence, the affidavit of the process-server, after first stating that he had received the summons on the 3rd or 4th of December, then alleges positively that the occurrence relied on as an act of bankruptcy—namely, Ryan's avoiding the service of the summons—took place on the 3rd of December. Such evidence would not warrant an adjudication in this Court.

The answer to the other objection—namely, that there was no consideration—is still more satisfactory; for it is clearly established that the bond was passed, not only for valuable consideration, but for a full money consideration, viz., legacies left to the bankrupt's

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children, which legacies the bankrupt had received into his hands, and converted to his own use, in discharging debts then due to his trade creditors.

As to the objection that the bond was voluntary, and that at the time of executing it the bankrupt was in insolvent circumstances, it appears to me that these facts were clearly established. But it is impossible now, at the end of so many years, to contend that the mere payment of money due, or the giving security for a debt, or the transfer of property, though voluntary, and even made at a time when the trader was in such a state of insolvency as to render bankruptcy probable, is sufficient to constitute a fraudulent preference. The authorities upon this point are clear, and long settled. *Atkinson v. Brindall (a)*, decided in the year 1835, is conclusive. That case was founded on *Morgan and another v. Brundrett (b)*, decided in 1833; and the same law was clearly laid down and followed in *Gibson v. Boutts (c)*, decided in 1836. All these cases establish the principle that it is not sufficient, in order to constitute a fraudulent preference, that the payment was voluntary, and made at a time when the trader was in insolvent circumstances; but there must be also this in addition, that it was made *in contemplation of bankruptcy*. True, it is not always easy to ascertain what it is that constitutes a contemplation of bankruptcy, but it is plain that it does not necessarily mean the immediate issuing of a commission. If the party contemplates that by the act thus done he will take any of his property out of the equitable distribution among his creditors intended by the bankrupt (that is, the commercial) law of this country, that will be enough to prove it a fraudulent preference. A trader may have bankruptcy in contemplation, although he does not clearly foresee all the consequences of his act. I shall content myself with reading one passage in the judgment of Chief Justice Tindal, in *Atkinson v. Brindall (d)*, which puts the principle in its true light and in very clear terms. He says (p. 370), "It seems to me that the direction of the learned Judge in this case was substantially correct. Down

(a) 2 Scott, 369.

(b) 5 B. & Ad. 289.

(c) 3 Scott, 229.

(d) 2 Scott, 369.

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to the time of his actual bankruptcy, a trader has the unrestrained dominion over his own property. The only exception to the rule is, that if he disposes of any part of it, contemplating bankruptcy at the time, and intending to prevent the equal and just distribution provided by the law, he thereby commits a fraud. The mere contemplation of insolvency, however, does not necessarily involve a contemplation of bankruptcy." In the present case there is no doubt that the execution of this bond and warrant was voluntary, in the sense of its not having been the result of any pressure, or even application, on the part of the creditor. Still it is totally unlike the case of *Abell v. Daniell* (a), cited by Mr. Fitzgibbon, for here the bond and warrant were clearly a substitute for a simple contract pecuniary debt. In *Abell v. Daniell*, there was no pecuniary debt or legal consideration, while there are both in the present case, besides a natural and moral conviction, operating on the mind of the trader, that he had received monies of his children to the amount of the principal sum in the bond. In truth, his executing the bond and warrant did not of itself give any preference to the trustees of his children. No doubt, the bankrupt may have had in his mind at the time a desire to secure his children in the sum really due to them; but it has been overlooked that the amount, even though the bond and warrant had not been given, would, in the event of his bankruptcy, have been proveable under his commission as a simple contract debt. I cannot concur in the opinion that this bond and warrant, even though void as a fraudulent preference, might not, nevertheless, set up a simple contract debt that had been barred by time. I am not now called upon to say whether the bond and warrant, if void as a fraudulent preference, would be also void for all purposes. Many cases have occurred where deeds, void in one particular aspect, have been held to be valid in another. Deeds, fraudulent and void under the statute as against creditors, may be perfectly binding as between the parties. In various instances, documents and contracts in writing, though not admissible in evidence (*ex. gr.*, as not being properly stamped), are yet quite valid to establish some other point. I remember a

(a) 1 M. & M. 370.

case where a contract between landlord and tenant, which was inadmissible as evidence on account of not being properly stamped, was, nevertheless, held to be quite valid for the purpose of proving the time the tenancy determined.

On this point of fraudulent preference, it is strongly urged that, at the time of executing the bond and warrant, the bankrupt was in insolvent circumstances, that is, unable to meet his trade engagements, which is the proper meaning of insolvency; for, although a trader have landed property, which, if sold, would be sufficient to pay twenty shillings in the pound, still, if he is unable to pay his trade debts, and particularly his acceptances, when they come due, he is, in the commercial world, insolvent. It is clear that the bankrupt was, in this sense, insolvent; but, in estimating his motives, I cannot entirely throw overboard his own positive assertion, on oath, that he believed himself to be solvent, when I remember that his landed property has, in this Court, brought £900; and also that he was not himself the only person who considered him to be solvent. All his creditors, as appears from their acts, thought so likewise; and, therefore, taking into account that he was in full credit, and possessed of landed property worth nearly £1000, it is not incredible that he really believed himself to be solvent.

Under all these circumstances, therefore, I look in vain for satisfactory evidence of any contemplation of bankruptcy; the more so, because between the time of the execution of the bond and warrant, and the issuing of the commission, upwards of nine months intervened, a fact most important in determining what was passing in the mind of the bankrupt, and one which appears to me to furnish an answer to the charge of his having then contemplated any distribution of his estate and effects different from that intended by the Bankrupt statutes. It seems to me, therefore, that the claim of the trustees, on this bond and judgment, merely as a debt proveable against the estate, cannot be impeached.

And this brings me to the all-important question, namely—the legal operation and effect of the registration, under the mortgage clauses of the last statute on judgments. I believe it is the first time that this extraordinary and mischievous enactment has been

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brought under the notice of any Court. I say deliberately, that the provisions contained in the 6th and 7th sections of the 13 & 14 *Vic.*, c. 29, must be attended with the most injurious consequences to the commercial interests of Ireland; consequences strangely overlooked by the person, whom I know not, who prepared those clauses. It is due to this Court to state publicly, that this Act was introduced without any communication with Mr. COMMISSIONER PLUNKET or myself; and I should, probably, have remained in complete ignorance of this injurious legislation until the present question was raised, were it not for the habit of reading the Acts passed each session immediately on their being published, and I thus first discovered these clauses, which are to transmute a mere judgment creditor, by his own act exclusively, into a complete mortgagee.

It is admitted that the intention of the Legislature in this enactment is to be deduced from the terms of the Act itself; and Mr. *Fitzgibbon* contended that if the Court should hold this registration to be a valid mortgage, it would be a repeal of the 126th section of our great Bankrupt Act, the 6 *W.* 4, c. 14, and that no such intention could be collected from the language of the statute. It is, therefore, of importance to ascertain whether or not the drawer of the 13 & 14 *Vic.*, c. 29, had the case of bankruptcy in his contemplation. That he had bankruptcy in his contemplation, while preparing this statute, is palpable from the general recital of the Act (section 1), and the special recital of the 6th section. In the former are found the words, "commissions of bankruptcy," and "the Laws in Ireland relating to bankrupts," three times repeated. The Legislature, therefore, in passing the 13 & 14 *Vic.*, c. 29, must be assumed to have had in view the existing Bankrupt statutes, and, of course, the important provisions of the said 126th section, cutting down judgments against the bankrupt to the level of mere simple contract debts. Now, the question is, do the mortgage clauses repeal this 126th section?

The leading object of the Act is the repeal of those clauses of the 3 & 4 *Vic.*, c. 105 (*Pigot's Act*), which made judgments a charge generally upon all the landed property of the consor, and to substitute enactments less sweeping, but more beneficial to the judgment

creditor, by giving him, or enabling him to give himself, a specific lien as actual mortgagee, not only on all lands, tenements and hereditaments whereof the conusor was seised or possessed at law or in equity, but also on "all such as he had any disposing power over, which he might, without the assent of any other persons, exercise for his own benefit" (section 7.)

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It was contended on the part of the general creditors that this section cannot apply to such a case as the présent, because an insolvent trader, owing more than all he is worth, cannot be said to be seised or possessed of any lands over which he has such a disposing power, for his own benefit. But I was satisfied at the time, and am quite convinced now, that these words, which are repeated in the general recital and in the 2nd, 6th and 7th sections, clearly refer to what is familiar in the bankrupt code, viz., the right of this Court to create, or to have executed for the benefit of creditors, all powers vested in the bankrupt which he might have legally exercised for his own benefit—for instance, the power of barring estates tail; 6 *W.* 4, c. 14, s. 79, and, more particularly section 91, providing "That all powers vested in any bankrupt, which he might legally exercise for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), may be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed the same."

During the argument, the requirements of the Act, in order thus to transform a judgment creditor by his own act merely into an actual mortgagee, were not discussed; and the subject being so important, and truly a *res integra*, I have thought it my duty to give particular attention to ascertain whether or not the trustees have strictly complied with these requirements. The affidavit (and it is the affidavit, and not the judgment which is to be registered) was made by one only of the conusees, and (the point not having been raised or argued) I am not to be understood as deciding that an affidavit by one only of several conusees is a sufficient compliance with the terms of the 6th section, which entitles and requires the "creditor" to make the affidavit, whether he be a creditor by judgment, or by decree, or order, or rule. This section

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contains particular directions as to the Court in which the affidavit is to be made, and the numerous and precise statements it is to contain, the omission of any one of which will make its registration inoperative:—first, the name or title of the cause or matter; second, the Court in which the judgment, &c., was obtained; third, the date of the judgment, &c.; fourth, the names; fifth, the usual or last known place of abode; sixth, the title, trade, or profession of the plaintiff (if there be such); seventh, and of the defendant, or person whose estate is to be affected; eighth, the amount of the debt, &c.; ninth, the statement that the conusor or debtor is *at the time of the swearing of such affidavit* (not at the time of entering the judgment, or obtaining such decree or order) seised, &c.; tenth, the lands tenements or hereditaments; eleventh, the county and barony, &c.

From the words of the section, it would appear that it was intended to distinguish between lands and premises in a county at large, and premises situated in a town. If in a county at large, the “county and barony” are to be specified. If in a town, then the affidavit should specify “the town, or county of a city, and *parish*, or the town and parish, in which the lands to which the affidavit relates are situate. And where such lands lie in two or more counties, or baronies, or parishes, or streets, or partly in one barony, parish, or street, and partly in another, the same shall be distinctly stated in such affidavit.” Therefore I would suppose that if the lands or premises be in a town, or in the county of a city, it is the parish and not the barony that ought to be specified. If, however, in such a case, the parish and the barony were both stated, the affidavit would be beyond exception on this head. In the present case, some of the lands are stated in the affidavit as lying “in the barony of Ballycon.” I have ascertained from the Ordnance survey that there is no such barony in the King’s county; and therefore, if this be not a mere mistake in copying, the affidavit is defective, and those lands are exempted from the operation of the statute.

I come now to the seventh section. What is the legal operation and effect of thus registering not the judgment or decree, &c., but

affidavit? It enacts, &c.—[Here his Honor read the words of the seventh section.]—This is an absolute statutable transfer to the creditor, by way of mortgage, of the entire estate and interest of the debtor, though only of such lands, &c., as are specially and formally mentioned in the affidavit, and of which the debtor, at the time of registering the affidavit (not at the time of entering the judgment, &c., or of making the affidavit), was seised, &c. All his other lands, not thus included in the affidavit, or subsequently acquired, are, if there be not a further affidavit and registry, exempt from the operation of the judgment, &c., as a lien. But chattels real continue liable to be taken in execution (section 10); so that a judgment creditor, thus registering the necessary affidavit, becomes an actual mortgagee, with a collateral judgment.

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This, in a commercial country, is an alarming power to give to the mere act of the creditor, without the privity or knowledge of the debtor. I am convinced that not only its operation in bankruptcy must have been overlooked, but that other most important considerations were equally forgotten. I venture to assert that these trustees, who thus made themselves assignees by mortgage, never reflected that they were rendering themselves liable for the payment of the rents and the performance of covenants—it being to all intents and purposes an actual assignment of the entire interest of the tenant debtor. The skill and knowledge of the conveyancer, rightly exercised to protect from such serious liabilities the mortgagee of a tenant's interest, are by those enactments set at nought. I am not called on to inquire what other legal results follow this statutable assignment—whether this mortgagee may not, the moment after registering the affidavit, bring an ejectment on the title, or serve notice on the tenants to pay their rents—whether or not other judgment creditors may, by force of the same enactments, make themselves mortgagees of the equity of redemption. But, I must ask, is it possible to argue in this case, with the words of a statute so clear, precise, and comprehensive, that the claimants continued to be mere judgment creditors? For, if not, then there is no clashing between the enactments of the two statutes. They are perfectly consistent.

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As to the objection that I am thus repealing the 126th section of the 6 *W.* 4, c. 14, the true test is to be found in *In re Perrin* (a), decided on appeal from my judgment, after three elaborate arguments, by so profound and accomplished a lawyer as Lord St. Leonards, then Sir Edward Sugden; and that test is—can these two sections, the 6th and 7th of 13 & 14 *Vic.* c. 29, stand together with the 126th section of the 6 *W.* 4, c. 14? Now it is plain that if the creditor, by so registering the affidavit, converts himself into an actual mortgagee (and that is the inevitable result of the 7th section), there is an end to the argument as to any collision between these two sections and the 126th of 6 *W.* 4. Further, the 126th section itself contains a clear answer to the objection, in the following words:—“Except in respect of any execution or extent served and levied by seizure upon, or mortgage of, or lien upon, any part of the property of such bankrupt before the bankruptcy.” Therefore, the 126th section itself has provided for such a case, and saves the right of this statutable mortgagee.

It appears to me, therefore, quite clear that this mortgage must stand, not however to the entire amount. The bond was executed in trust for the seven children of the bankrupt, of whom only three survive, and one is a minor. Therefore, as the father is entitled to the shares of his deceased children, three-sevenths only of the mortgage can be taken out of the estate to the prejudice of the general creditors. The costs of the trustees and of the assignees are to be paid out of the produce of the mortgaged premises. I must say, in conclusion, that I am strongly of opinion that before the close of the present session of Parliament, a clause ought to be introduced into some Irish Act, to the effect that no such mortgage as this should, in the event of the bankruptcy of the conusor of a judgment, or other party liable, give any priority over the other creditors under the commission.

(a) 4 *Ir. Eq. Rep.* 362; *Ibid.*, 109.

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DUNSTER v. LORD GLENGALL.

(*In the Rolls.*)

April 20, 22.

May 24.

IN Easter Term 1849, Richard, William and Henry Sargeant, obtained a judgment against the Earl of Glengall, for the penal sum of £654. 10s. 0d. On the 2nd of February 1851, Lord Glengall deposited with Henry Sargeant, by way of collateral security, the certificates of twenty shares in the Waterford and Limerick Railway Company, and at the same time wrote a letter, charging the shares with the sum due on foot of the judgment.

An equitable mortgagee, by deposit of Railway shares, is entitled to priority over a prior judgment creditor of the mortgagee, who has obtained an order charging the shares, under the 3 & 4 Vic., c. 105, s. 23, subsequently to the mortgage.

*Quære—* Whether the doctrine of *Dearle v. Hall* (3 Russ. 1) is applicable to an equitable assignment of Railway shares?

The petitioner, William Hilliard Dunster, obtained a judgment against Lord Glengall, on the 22nd of May 1848, for £289. 5s. 1d. On the 2nd of May 1851, the petitioner obtained a conditional order, under the 3 & 4 Vic., c. 105, s. 23, that the said shares should stand charged with the sum of £289. 5s. 1d., and £5. 19s. 6d. costs. Lord Glengall filed an affidavit as cause against the conditional order, which was made absolute on the 2nd of June 1851. The affidavit stated the equitable mortgage to Sargeant. The conditional and absolute orders were served on the Railway Company. On the 10th of January 1852, W. H. Dunster filed a cause petition, praying an account of the sum due on foot of the judgment, and a sale of the shares. The usual order was made, under the 15th section of the Court of Chancery Regulation Act, 1850; and on the 9th of April 1853, Master Brooke made a decretal order, by which he declared that there was due to the said Henry Sargeant the sum of £350. 0s. 3d., as equitable mortgagee of the shares, and that he was entitled to the same, together with his costs in the matter, in priority to the demand of the said W. H. Dunster, who now moved, by way of appeal, that it might be declared that H. Sargeant's demand was puisne and subsequent to the petitioner's demand and charge on the said shares.

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Mr. *F. A. Fitzgerald*, for the motion.

The petitioner under the charging order obtained a specific charge *in rem* on the shares, which H. Sargeant has not. The letter of the 2nd of February 1851 was merely an equitable contract to transfer a chose in action. It would not operate as a transfer until notice, which does not appear to have been given to the Company: *Dearle v. Hall*; *Loveridge v. Cooper* (a). The doctrine of *Whitworth v. Gaugain* (b), on which the Master's decision seems to have proceeded, does not apply to a chose in action, because the title of the equitable mortgagee of real estate is complete without notice to the debtor. The equitable mortgage of itself gives him an interest in the land: *Jones v. Jones* (c); *Boyle v. Farrell* (d). The principle of *Whitworth v. Gaugain* is, that the equitable mortgagee had a complete estate in equity. That principle is not applicable to this case, for Sargeant has but a right to compel Lord Glengall to transfer the shares. Until that is done his title is incomplete; for by the 20th section of the Companies Clauses Consolidation Act, 1845 (8 Vic. c. 16), the Company are not bound to see to the execution of any trust, nor on the other hand could the Company compel Sargeant to pay calls: *Newry Railway Company v. Moss* (e).

Mr. Serjeant *Christian* and Mr. *Hemphill*, in support of the Master's order.

The doctrine of *Dearle v. Hall* is applicable between two conflicting assignees only; but as between the assignor and assignee, the assignment is complete, and it cannot apply to a mortgage of railway shares, because notice to the Company is of no avail. But suppose it to be applicable, two things are essential to enable the judgment creditor to avail himself of it. First, it must appear that at the time he obtained his equitable charge, he had no notice of the prior equitable charge; secondly, that upon obtaining the charge he completed his title by serving notice on the Railway Company. Neither ingredient is found in this case. When he obtained the absolute order, he

(a) 3 Russ. 1.

(b) 1 Ph. 728.

(c) 8 Sim. 633.

(d) 12 Cl. & Fin. 740.

(e) 14 Beav. 64.

had notice of one charge by the affidavit of Lord Glengall, which disclosed it. The absolute, and not the conditional, order creates the charge: *Burt v. Bernard* (a). The latter is merely notice to the party. A charging order affects only the interest of the debtor, and therefore does not interfere with the rights of prior incumbrancers: *Hulkes v. Day* (b). That is the principle of *Whitworth v. Gauguin* (c). At the time the charging order was obtained, Lord Glengall was entitled to nothing, except what remained after payment of the equitable mortgage, and the charging order affects only the property of the debtor. Such is the effect of the Act as to real estate under the 22nd section: *Evans v. Evans* (d); and the language of the 23rd section is the same in all material parts. *Ex parte Dobson* (e); *Duncuft v. Albecht* (f); *Bearecliffe v. Dorington* (g); *Hyde v. Atkinson* (h); *Williams v. Craddock* (i); *Rochard v. Fulton* (k); *M<sup>c</sup>Intyre v. Connell* (l); *Fowler v. Churchill* (m), were also cited.

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Mr. Norman, in reply.

A chose in action cannot be completely transferred until notice is given, and the notice must be direct, and not constructive or implied: *Jones v. Gibbons* (n); *Thompson v. Spiers* (o). The 135th section of the Companies Clauses Consolidation Act, 1845, contains provisions as to the manner of serving notice on the Company; but until notice is served, the matter rests on personal contract, which no doubt may be enforced. But it is the notice which attaches the thing, and makes the debtor a trustee. That doctrine does not apply to real estate, because there the contract is complete, and transfers an estate: *Wiltshire v. Rabbits* (p); *Foster v. Blackstone* (q). Both the conditional order and the absolute order were served on the

(a) 3 Dr. & W. 464.

(c) 1 Ph. 728.

(e) Mont. Dea. & De G. 685.

(g) 14 Jur. 1101.

(i) 4 Sim. 316.

(l) 18 Law Times, 24.

(n) 9 Ves. 407.

(p) 14 Sim. 76.

(b) 10 Sim. 41.

(d) 2 Ir. Chan. Rep. 242.

(f) 12 Sim. 189.

(h) 2 Ir. Chan. Rep. 246.

(k) 7 Ir. Eq. Rep. 131.

(m) 11 M. & W. 57.

(o) 13 Sim. 469.

(q) 1 M. & K. 497.

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Company. It is the former which creates the charge under the 23rd section, which is essentially different from the 22nd.

THE MASTER OF THE ROLLS.

This was a motion by way of appeal from an order of Master Brooke. The notice prayed that the order might be set aside, or varied, so far as it declares that Henry Sargeant, therein named, is entitled to the sum of £350. 0s. 3d., as equitable mortgagee of the twenty shares standing in the name of the respondent, the Earl of Glengall, in the books of the Company called the Waterford and Limerick Railway Company.

The petition in the matter was filed under the Chancery Regulation Act, and an order of reference was made to the Master, under the 15th section of the Act. The Master made a decretal order on the 24th of March, and the present motion is made by way of appeal from that order. The facts of the case are shortly these:—Henry Sargeant, in whose favour the Master has decided, obtained a letter from Lord Glengall, bearing date the 2nd of February 1851, which is in these terms:—

“DEAR SIR—I hereby charge my shares in the Waterford and Limerick Railway Company with the sum of £316. 4s. 0d., which I acknowledge myself indebted to you, and I deposit said shares with you by way of equitable mortgage, as collateral security for the above debt.”

(Signed)

“GLENGALL.”

That letter is directed to Henry Sargeant, Esq. In Easter Term 1849, Mr. Sargeant had obtained a judgment against Lord Glengall.

The petitioner's rights are these:—He obtained a judgment against Lord Glengall on the 22nd of May 1848; of course that judgment was not a charge on the shares, and no priority was gained by reason of the judgment. However, on the 2nd of May 1851, the petitioner obtained a conditional order, under the 3 & 4 Vic., c. 105, s. 23, charging those shares. That order was made absolute on the 2nd of June 1851.

The Master has decided that Henry Sargeant, the equitable mortgagee of the shares, has priority. I am of opinion that the Master was right.

It was contended on the part of the petitioner, that Mr. Sargeant was the assignee of a chose in action, and that having omitted to give notice to the Waterford and Limerick Railway Company, of the letter of the Earl of Glengall, of the 2nd of February 1851, the petitioner, according to the true construction of the 3 & 4 of *The Queen*, c. 105, c. 23, obtained priority by the charging order, which, it is said, had the same effect as if the petitioner had obtained an equitable assignment of the shares subsequently to the date of the letter from Lord Glengall to Mr. Sargeant, and had given notice to the Railway Company of such equitable assignment.

There is no doubt of the rule that, in order to perfect a valid assignment of a chose in action, it is necessary, as against a subsequent assignee for value or the assignee in bankruptcy, to give notice to the trustee of the fund; otherwise the incumbrancer, who first gives notice, or the assignee in bankruptcy, will be preferred: *Dearle v. Hall* (a); *Loveridge v. Cooper* (b); *Etty v. Bridges* (c). In *Dearle v. Hall*, Sir T. Plumer said:—"I admit that, if you mean to rely on contract with the individual, you do not need to give notice: from the moment of the contract, he with whom you are dealing is personally bound. But if you mean to go further, and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice; and unless notice is given, you do not do that which is essential in all cases of transfer of personal property." In a subsequent part of the judgment, Sir T. Plumer says:—"It is true that a chose in action does not admit of tangible actual possession; but in *Ryall v. Rowles* the Judges held that, in the case of a chose in action, you must do every thing towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose, you must give notice to the legal holder of the fund; in the case of a debt; for instance, notice to the debtor is for many purposes tantamount to possession. If you omit to give that notice, you are guilty of the same degree

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(a) 3 Russ. 1.

(b) *Ibid*, 30.

(c) 2 Y. & C., C. C., 486.

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and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person." Again :—" Notice then is necessary to perfect the title, to give a complete right *in rem*, and not merely a right against him who conveys his interest. If you are willing to trust the personal credit of the man, and are satisfied that he will make no improper use of the possession in which you allow him to remain, notice is not necessary, for against him the title is perfect without notice ; but if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they purchase from him as the actual owner, and they part with their money before your pocket conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated ; you had priority, but that priority has not been followed up, and you have permitted another to acquire a better title to the legal possession."

The cases of *Dearle v. Hall*, and *Loveridge v. Cooper*, were afterwards affirmed by Lord Lyndhurst (3 *Russ.* 48), who observed, that in cases like the present, the act of giving the trustee notice was in a certain degree taking possession of the fund. It was going as far towards equitable possession as it was possible to go ; for after notice given, the trustee of the fund becomes a trustee for the assignee, who has given him notice.

In the case of *Etty v. Bridges*, where, by reason of the death of a person, in whose name stock was standing, without legal personal representatives, there was no trustee to whom notice could be given, it was held by Vice-Chancellor Knight Bruce, that a second incumbrancer, without notice of the first, by serving a writ of *distringas* on the Bank of England, thereby gained priority. The same principle has been applied in the case of persons obtaining equitable assignments of, or charges upon, a fund in Court. In such case the party who obtains the first stop order gains priority : *Greening v. Bechford* (a) ; *Swayne v. Swayne* (b). According to Mr. *Daniel* and Mr. *Smith*, in their works on *Chancery Practice*, the stop order however must be lodged with the Accountant-General, in order to

(a) 5 Sim. 195.

(b) 11 Beav. 463.

gain priority thereby. The necessity of lodging the order with the Accountant-General has not been raised or decided in this country, so far as I am aware.

The petitioner's Counsel contended that the same principle is applicable where a judgment creditor obtains a charging order, under the 3 & 4 of *The Queen*, c. 105, s. 23; and that he has, by such charging order, gained priority over the equitable claim of Mr. Sargeant, under the letter of the 2nd of February 1851, the latter not having given notice to the Railway Company of such letter.

The 23rd section of the 3 & 4 of *The Queen*, c. 105, incorporated the provisions of the 1 & 2 of *The Queen*, c. 110, s. 14, and the 3 & 4 of *The Queen*, c. 82, s. 1, the statutes in force in England in relation to charging orders.

It appears to me that the Master was right in deciding that Mr. Sargeant has priority.

It is to be kept in mind that, previously to the statute, there was no mode by which Government stock, or shares in public companies, could be taken in execution at Law, or made liable by proceedings in Equity, to the demand of a creditor (a). I apprehend that the object of the statute was to remedy this defect in the law; and accordingly it provides that the charging order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; and with respect to stock, shares, &c., standing in the name of the Accountant-General, the order is to have no greater effect than if the judgment debtor had charged the stock, funds, shares, &c., in favour of the judgment creditor. Now it is clear that the assignee of a chose in action, assigned by an instrument which is available only in equity, must take subject to all equities which subsist against the assignor (b): and if a judgment debtor charges stock or shares at different times in favour of two parties, the second incumbrancer, until he gives notice, takes subject to the claim of the first; and notice must be given to the trustee of the fund, in order to entitle the second incumbrancer to acquire priority. The

(a) *Bank of England v. Lunn* (15 Ves. 577); *M<sup>r</sup> Carthy v. Gould* (1 B. & B. 389).

(b) See the cases referred to in *Select Cases in Chancery*, 2nd edition, by Stewart Mac Naghten, pp. 118, 119; and see 15 *Beavan*, 118.

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first incumbrancer's claim is valid as against the debtor, and is also valid as against the second incumbrancer until the latter acquires priority by giving notice. The statute in terms only gives the same right to the judgment creditor, who obtains the charging order, as if such charge had been made in his favour by the judgment debtor. The petitioner's Counsel in effect require that I should insert the further words in the statute:—"And as if the judgment creditor had given notice of such charge." It is to be observed that there is a plain distinction between the assignee of a chose in action, who advances his money on the faith of the assignor being the actual owner, and a judgment creditor. The object of the statute, as to the latter, appears to have been to remedy the defect in the law to which I have adverted, that stock and shares could not be taken in execution at Law, or attached by any proceeding in Equity.

It is said that the Master referred to the case of *Whitworth v. Gaugain*; but it was not explained by Counsel in what way that case was applicable. However it is probable that the Master considered that,—as it was decided in that case that an equitable mortgagee has a right in equity to enforce his security against the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an elegit, without notice of the mortgage—on the same principle a judgment creditor, who has obtained a charging order against stock or shares, was not intended by the statute to acquire thereby any greater right to the stock than the debtor himself had therein; and as against the debtor (*Lord Glengall*) the letter of the 2nd of February 1851 was clearly binding.

That view appears to be in accordance with the language of the statute, the Court adding nothing to it, and interpreting the words according to their grammatical construction:—and such appears to be in the present case the proper construction, having regard to the rule of construction of statutes laid down by Judge Burton, in *Warburton v. Ivie*, and cited and approved of by Baron Parke, in *Doldenay v. Colt (a)*, and by Lord Justice Bruce, in *Gum-*

(a) 1 Tyr. & Gr. 334.

*dry v. Pinniger* (a). Judge Burton said:—"I apprehend it to be a rule in the construction of statutes that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention, or any declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended or abridged, so as to avoid such an inconvenience, but no further."

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Since this case was argued, the case of *Beardcliff v. Dorington*, which was cited from *The Jurist*, has been published in 4 *De G. and Sm.*, p. 122. In that case, real and personal property had been devised and bequeathed upon trust for sale, and for distribution of the residue (after payment of debts, and subject to an annuity given by the will) among the children of the annuitant. One of the children, W. P. Dorington, created incumbrances by assignments of June 1837 and October 1838, in favour of Mr. Doubleday, and by assignments in December 1844 and October 1845, to Mr. Satchwell. On the 27th of April 1846, a judgment was obtained by Mr. Jenkins. The real estates were ordered to be sold in 1845. They were sold, and the proceeds were invested in £3 per cent. consols. On the 10th of November 1848, Jenkins obtained an order charging one-fifth of the cash, under the 1 & 2 *Vic.*, c. 110, s. 14, and 3 & 4 *Vic.*, c. 82, s. 1. The same argument was used before Sir Knight Bruce in that case as was used before me. It was contended on behalf of the judgment creditor, that when he obtained his charging order, no other party had obtained a stop order, or taken any proceedings with reference to the fund in Court. The Vice-Chancellor, however, said:—"It does not appear to me that *Etty v. Bridges* was incorrectly decided, but I am certainly not satisfied of its applicability to the present case. In the first place, I doubt very much whether Mr. Jenkins is entitled to all the same rights as if he had been a purchaser by particular contract for value: he is not in this situation. He claims as a judgment creditor under the Act 1 & 2 *Vic.*, c. 110, s. 13, which provides, that every judgment creditor shall have such and the same remedies in a Court of Equity against

(a) 1 De G. M'N. & G. 505.

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the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest thereon. I doubt whether this provision enables him to obtain more than his debtor had at the time fairly to dispose of. I do not, however, think it necessary to decide the point." It appears to me that the opinion thus expressed by Sir Knight Bruce is correct, and that Lord Glengall having, by the letter of the 2nd February 1851, granted an equitable charge on the shares, his judgment creditor did not obtain by the charging order more than Lord Glengall had at the time fairly to dispose of.

I shall therefore affirm the Master's order.

It was assumed in the argument of this case, that if a second assignment had been made of the shares, priority could have been gained by service of notice on the Company by the second assignee. I have not seen the special Act of the Waterford and Limerick Railway Company; but if it embodies the Companies Clauses Consolidation Act, 1845, the Company are not bound to recognise any trust, according to the 20th section of that statute. If so, the doctrine of *Dearle v. Hall* would perhaps be inapplicable to the railway shares, as the Company could not, by the service of any notice, be made trustees for the equitable assignee of shares. It is not, however, necessary that I should offer any opinion upon that question in the present case.

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Rolls.

In the Matter of  
THE RENEWABLE LEASEHOLD CONVERSION ACT,  
*Ex parte* SAMUEL KNOX, *Petitioner.*

(*In the Rolls.*)

1853.  
Dec 3.

1854.  
Jan. 12, 21,  
28.  
Feb. 14.

In this case a petition was presented by Samuel Knox, Esq., under the provisions of the Renewable Leasehold Conversion Act (12 & 13 of *The Queen*, c. 105, s. 22), against the respondents, the Society of the Governor and Assistants, London, of the New Plantation in Ulster, within the realm of Ireland, commonly called the Irish Society, praying that a grant in fee-farm might be executed under the provisions of the said Act by the respondents to the petitioner, of the messuage, lands and tenements demised by the lease in the petition mentioned, which lease bore date the 29th of September 1830; and further praying the usual consequential directions.

Construction of the 5th section of the Renewable Leasehold Conversion Act.

Where the landlord is seised in fee-simple of the reversion, he is entitled to compensation under the 5th section of the statute for the conversion of the estate in the reversion to an estate in the fee-farm rent.

The petition stated that the respondents, the Irish Society, were, in and previously to the year 1767, seised in their demesne as of fee of and in the town and liberties of Coleraine, in the county of Londonderry, and of the lands therein comprised.

That in or about that year, the said Society, in order to improve their property in the said town and liberties, and to promote the outlay of money on building on the lands demised, granted to most of their tenants leases of their several holdings within the said town and liberties, with covenants in such leases for the perpetual renewal thereof, and that such leases were granted on terms very favourable to the said Society, and at a large increase of the former rent of such holdings.

The petition further stated that at or about the time and under the circumstances aforesaid, the Irish Society granted a certain lease of the premises particularly mentioned and described in the lease of the 29th of September 1830, in the petition thereafter mentioned,

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—  
*Statement.*

for a term of three lives and twenty-eight years concurrent, with a covenant in such lease for the perpetual renewal of the term thereby granted; but that said lease having been long since surrendered to the said Society, upon a renewal thereof, the petitioner was unable to state the exact date thereof.

The petition further stated that renewals of the said original lease were made from time to time by the said Society; and that, amongst others, a renewal thereof was made to one James Nesbitt, by indenture, bearing date the 1st of August 1817.

The petition further stated that all the interest under the said original lease, and the subsequent renewals thereof, was, in and previously to the year 1830, vested by mesne assignments thereof in the petitioner.

These statements in the petition were unsupported by any evidence, except a recital in the lease hereinafter next mentioned, that such lease was made to the petitioner in consideration of the surrender of a lease bearing date the 1st of August 1817.

The petition further stated the indenture bearing date the 29th of September 1830, which indenture was made between the respondents (the Irish Society) of the one part, and the petitioner of the other part, whereby the said respondents, for certain considerations, and amongst others, in consideration of the surrender of the said lease of the 1st of August 1817, granted, demised, re-leased, &c., to the said Samuel Knox the petitioner (in his actual possession being, by virtue, &c.), and to his heirs and assigns, all that messuage, lands and tenements (particularly mentioned and described in said indenture) except and always reserved out of the said grant and demise—(then followed an exception of mines, &c.), to hold to the said Samuel Knox, his heirs and assigns, for and during the natural lives of Prince Leopold of Saxe Coburg, Hugh, Duke of Northumberland, and Sir Robert Peel, Bart., and the life of the survivor of them the said lives; and in case all the said three lives should happen to die before the expiration of the term of twenty-eight years, to commence and be computed from the 29th of September 1830, then to have and to hold all and singular the said messuage, lands and tenements, &c. (except as before excepted), to the said Samuel Knox, his exe-

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*Statement.*

cutors, administrators and assigns, for and during all the residue and remainder of the said term of twenty-eight years, to commence and be computed as aforesaid, that should be to come and unexpired at the time of the death of the survivor of them the said lives; the said Samuel Knox (the petitioner), his heirs, executors, administrators and assigns, yielding and paying therefor and thereout yearly, and every year during the continuance of the term thereby granted, to the said Society and their assigns, the clear yearly rent or sum of £11. 12s. 7d., of lawful money of Great Britain, on every 25th of March and 29th of September, by even and equal portions; and also yielding and paying therefor and thereout, at the end or expiration of every seven years of the term thereby granted, to be computed from the 29th day of September 1830, during the continuance of the said demise, unto the said Society or their assigns, the additional rent or sum of £11. 12s. 7d., of lawful money of Great Britain, together with the sum of three guineas of the like money, as and for the fees of the secretary of the said Society for the time being—the said additional rent and secretary's fees to be paid on the 29th of September next after the expiration of every seven years of the tenant's estate thereby granted—the first payment of the said additional rent and secretary's fees to be made on the 29th of September 1837. Clauses of distress and re-entry then followed; and also covenants by the petitioner for himself, his heirs, executors, administrators and assigns, to pay the rent, and to pay all taxes, &c., to be imposed on the demised premises, or upon the Irish Society as landlords thereof, and also to keep the demised premises in repair.

There were certain special covenants in the lease, which did not appear to be material to the question which arose in the case; and amongst others, the covenants mentioned in the 11th section of the Renewable Leasehold Conversion Act.

The lease then contained a covenant in the following terms:—

“And the said Society, for themselves and their assigns, do hereby further covenant, promise, grant and agree, to and with the said Samuel Knox, his heirs, executors, administrators and assigns, that the said Samuel Knox, his heirs, executors, administrators and assigns, well and truly paying the said reserved yearly rent of

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£11. 12s. 7d., and the said reserved septennial rent of £11. 12s. 7d., with the said septennial sum of three guineas, on the days and at the times herein before limited and appointed for the payment of the same respectively, without any deduction, defalcation or abatement whatever, and keeping and performing all and singular the covenants and agreements herein before reserved and contained, on his or their parts to be paid, kept and performed; they, the said Society, or their assigns, upon the request of the said Samuel Knox, his heirs, executors or assigns, and upon his or their surrender of this present indenture of lease, shall and will, at or immediately after the end or expiration of twenty-one years, to commence and be computed from the 29th of September 1830, or in case all of the said lives in, these presents named shall die within the term of twenty-one years, to be computed as aforesaid, then within nine months after the death of the survivor of them, make out and grant unto the said Samuel Knox, his heirs and assigns, or to such person or persons as he or they shall appoint, his or their heirs and assigns, a new indenture of lease of all and singular the premises hereby demised, or intended to be demised, and of all such erections and buildings as shall then be erected or standing thereon, or on any part thereof, with their and every of their appurtenances, for and during the natural lives of such three persons as he or they shall nominate for that purpose, and for a term of twenty-eight years concurrent with the said three lives, at and under the yearly rent and septennial rent, with secretary's fees as aforesaid, to be made payable half-yearly, on the feast days or times (25th March and 29th September) aforesaid, the first half year of the said yearly rent to be made payable on such of the said feast days as shall first and next happen after the commencement of such new lease; which said new lease shall contain all and every the covenants, clauses, provisions, conditions and agreements herein expressed or contained, as well on the part of the said Society, or their assigns, as on the part of the lessee or lessees in such new indenture of lease to be named, his or their heirs, executors, administrators and assigns; so as the lessee or lessees in such new indenture of lease to be named do seal and deliver two counterparts thereof to the said Society, or their assigns, and do at the same time pay off and discharge unto the said

Society, or their assigns, or their agent or secretary for the time being, all arrears, if any, then due of the said yearly rent, septennial rent and secretary's fees: provided nevertheless, and it is hereby expressly declared and agreed, by and between the said parties to these presents, that if such request for a new lease shall not be made, and the said yearly and septennial rent and secretary's fees shall not be paid off and discharged as aforesaid within the space of six months next after the expiration of the said term of twenty-one years, or in case of the death of all the *cestui que vie*s within the said term of twenty-one years, then within the space of six months next after the death of the survivor of the said *cestui que vie*s, then and in such case the said Samuel Knox, his heirs or assigns, or any of them, shall not be entitled to any renewal by virtue of any covenant or agreement herein contained, or otherwise howsoever, but shall forfeit and lose all tenant-right, and be for ever foreclosed and be barred therefrom, any thing herein contained, or any usage, custom or practice to the contrary thereof, in anywise notwithstanding—provided nevertheless, and it is hereby agreed and declared to be the true intent and meaning of these presents, and of the parties hereto, that the term and estate hereby granted, or intended to be renewed as aforesaid shall, in the manner and upon the terms and conditions herein before specified, and not otherwise, be renewable for ever."

The petition then stated that the petitioner entered into possession of the said messuage, lands and premises, under and by virtue of the said indenture of demise, and was absolutely seised and possessed of all the estate and interest thereunder, and of the benefit of renewal thereunder.

That the life of the said Prince Leopold of Saxe Coburg was still subsisting, and that the petitioner, being desirous to obtain a grant in fee-farm of the said messuage, lands and premises, under the provisions of the said Renewable Leasehold Conversion Act, presented his memorial to the said Society, who were the owners of the reversion of the said premises, requiring such fee-farm grant, and offering to pay the solicitor of the said Society for the costs of preparing the same.

That, in reply to such application of the petitioner, William

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*Rolls.*

*Ex parte*

KNOX.

*Statement.*

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*Rolls.*  
*Ex parte*  
 KNOX.  
 —  
*Statement.*

Green, the agent of the said Society, wrote and sent to the petitioner a letter, bearing date the 2nd of July 1853, which was in the words and figures following:—

“SIR—Your memorial, praying for a fee-farm grant of your holding in Coleraine, was taken into consideration by the court of the Honorable the Irish Society, held on the 28th ultimo, and it was resolved thereon, that no grant in fee be made by the said Society until after the decision in the House of Lords in the case of the Marquis of Donegal, as to the compensation which the owners of the reversion are entitled to under the 12 & 13 Vic., c. 105, clause 5; and that the memorialist be informed that the Society cannot grant the prayer of his memorial unless he is prepared to pay the Society three times the present annual value of the property comprised in the lease, *i. e.*, for the loss of the reversion, as pointed out in the 5th clause of the Renewable Leasehold Conversion Act.”

The petition then stated that the petitioner, on the 16th of July 1853, caused Mr. William Green, the agent of the said Society, to be served with a notice addressed to the said secretary, on the part of the petitioner, part of which was in the words and figures following:—“And inasmuch as I did by said memorial express my willingness to agree to the terms proposed by you, on which you were willing to make fee-farm grants to your tenants, and on which I am informed you have already made grants to some of your tenants, and that I was willing to pay your own solicitor for preparing said grant: now I do hereby give you notice that unless I am furnished with said grant within one fortnight from the service of this notice, I shall present a petition to the Lord Chancellor of Ireland for enforcing my right to such grant.”

The petition further stated that the petitioner, having received no reply to such notice, did, upon the first day of October 1853, by his solicitor Robert Crookshank, cause a draft fee-farm grant to be tendered, and caused a notice in writing on the part of the petitioner to be served upon John E. Davies, Esq., the secretary of the said Society in London, part of which notice was in the words and figures following:—“Take notice that I herewith furnish you, on the part of the said Society, with a draft fee-farm grant of the

said premises for your approval, and I undertake to pay you or the said Society any costs you may properly and necessarily incur in relation to the said grant so required by me ; and I further inform you, on the part of the said Society, that I am willing to abide by the opinion of a notary, on a proper case being laid before him for the purpose of ascertaining the said increased rent ; and I hereby give you notice that in case you or some other person properly authorised by the said Society shall not return to me the said draft, or specify in writing your or their objections thereto within one month from the service thereof, I will immediately on the expiration of such period present a petition to the Court of Chancery, under the provisions of said Act, for the purpose of enforcing a grant from the said Society, and will rely upon this notice and the accompanying documents, and the service thereof, and the said facts and circumstances, in order to charge the said Society with the costs of such proceedings."

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The petition then stated that, in reply to said notice, the petitioner's solicitor received from the said John E. Davies a letter bearing date the 26th of October 1853, which was in the following words, that is to say :—

" Irish Chambers, Guildhall.

" SIR—Your notice on behalf of Mr. Samuel Knox has been laid before the Court of the Honorable the Irish Society, and it was resolved thereon that this Society cannot alter the resolution come to in respect thereof at the court held on the 28th of June last."

The petition further stated that all the said yearly and septennial rent, and all the said septennial fees payable in respect of the said demised premises, had been fully paid and satisfied, up to the 26th day of March last past, and the petitioner stated that he was advised and submitted that he was entitled to a fee-farm grant under the provisions of the said Act, and that he believed his right to such was disputed not by the said Society, but that the said Society refused to execute the same, except on receiving compensation as aforesaid for the loss of the reversion of the said premises ; and the petitioner submitted that the Irish Society were not entitled to any such compensation.

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 —  
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The Irish Society did not serve a notice under the provision contained in the latter part of the 1st section of the Renewable Leasehold Conversion Act, stating that the right of the petitioner to require a grant in fee-farm was disputed, nor did they by their Counsel dispute such right.

Two affidavits were made on behalf of the Irish Society.

The first, which was filed on on the 2nd of December, was made by Stewart Gordon, surveyor and civil engineer, and stated that he, at the instance and request of Archibald M'Corkell, solicitor to the Irish Society, had made a valuation of the premises demised by the said lease of the 29th of September 1830, and that the present annual value thereof, exclusive of taxes and the outgoings payable in respect thereof, including rent, was £86 sterling, which, according to the best and utmost of his skill and ability, was a correct and fair valuation thereof.

The other affidavit filed on behalf of the Irish Society, and which was made by Maurice Collis, civil engineer and general valuator of land in Ireland, stated that he (Mr. Collis) had for a great number of years been extensively engaged in the valuation of land in different parts of Ireland; that he had valued the estates of some of the London Companies, including those of the Irish Society, and had extensive practical experience in such valuations; that he was well acquainted with the marketable value of the interests of tenants holding by leases for lives renewable for ever, and of the interests of the lessors of such leases. And the affidavit then proceeded in these words:—"And saith that in deponent's opinion the difference between the leasehold interest and the grant in fee would be two years' purchase, at least, in favour of the latter; and deponent is satisfied and convinced that the conversion of such an interest for lives renewable for ever into a fee-farm grant would increase the value of the lessee's interest to that extent; and that in deponent's opinion the lessor of such interest would be entitled to same, and would, if the Renewable Leasehold Conversion Act had not passed, have received such difference in value, upon a dealing for a similar conversion, if competent to enter on same, under ordinary circumstances, as between lessor and lessee."

The case was argued at the Sittings after Michaelmas Term 1853 (December 3rd), and stood over for judgment until the following Hilary Term, when (Jan. 12) the MASTER OF THE ROLLS expressed an opinion that the charter of the Irish Society, which had not been referred to in the petition or affidavit, or the argument of the case, was material in the consideration of the question; and suggested that the petition should be amended, or an affidavit filed, bringing forward the charter, so as to have the case fully before the Court. The case, however, was again brought before the Court, without any amendment of the petition, or any further affidavit.

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—  
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Mr. F. Fitzgerald and Mr. Twigg, for the petitioner.

The engineer has calculated the difference between the value of the leasehold interest which the lessee now has, and the estate which he would acquire by the conversion of it into a fee-farm; and he comes to the conclusion that the interest of the tenant would be increased by two years' value; but there is nothing in the case to show that this reversion is of more value than an ordinary reversion. The question is precisely the same as that raised in *Ex parte Somerville* (a), and *Ex parte the Belfast Corporation* (b). The Act recites that "Where lands in Ireland are held under any lease in perpetuity, the owner of such lease in perpetuity, at any time after the passing of the Act, and whether the time for renewal has or has not arrived, may require the owner of the reversion to execute a grant, according to the provisions of the Act, of the lands comprised in such lease; and the owner of the reversion, upon being so required, &c., shall execute a grant, &c., subject to the like covenants and conditions for securing the payment of such fee-farm rent as are contained in the lease with respect of the rent thereby reserved, and with and subject to such other covenants, conditions, exceptions and reservations, save, &c., as are contained in such lease, and then subsisting." The first thing to be considered is, what was the doctrine of the Court as to the nature of this interest? It is thus stated by Lord Redesdale, in *Lennon v. Napier* (c):—"The meaning of the parties to these contracts is to secure

Argument.

(a) 2 Ir. Jur. 203.

(b) July 15, 1851 (not reported).

(c) 2 Sch. & Lef. 685.

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KNOX.*Argument.*

a continuance of the tenure and rent, and payment of the fines, and to prevent a conversion of the tenure by enjoyment without renewal into a fee-farm; for, notwithstanding the payment of rent, if there was to be no renewal from time to time, the presumption of a fee-farm would arise; and where the covenant for renewal is a pepper-corn fine, which is often the case, the preservation of the tenure, and of the remedies for the rent, must be the only object. In the original contract for such leases, the object on the part of the landlord is the enjoyment of a clear rent, and in many cases an occasional fine, seldom more than half a year's rent, sometimes very small, with the consequences of the fee remaining in him; and on the part of the tenant, the contract is for the perpetual enjoyment of the land, and an encouragement to make such extensive improvements as could not be expected to be made but with a view to such continued enjoyment." What, then, is the nature of this tenure, in the contemplation of a Court of Equity? On the part of the tenant, it is a perpetual estate in the land: on the part of the landlord, a perpetual right to the rent—to the renewal fines, and the enjoyment of the tenure, as giving him the legal remedies for enforcing the rent and the several covenants. That was what each party had previous to the passing of this Act, and which he could retain, after a fee-farm grant, no otherwise than by a continuance of the legal remedies for enforcing the rent and covenants. The Act then, by the 1st section, directs all subsisting covenants, with certain exceptions, to be inserted in the fee-farm grant; and although by the 3rd section it gives a right to the lessee to have certain covenants expunged or modified, it provides special compensation to the landlord in respect of such alteration. The 2nd section gives the landlord the rent reserved by the original lease, and it gives him the value of the renewal fines, specially directing the mode in which they were to be valued. Do not those three sections then give the landlord every thing which he had before the statute, according to the doctrine of Courts of Equity? What he had before the statute was a perpetual rent—a perpetual periodical payment of fines, and as incidental to a legal reversion, a legal right to enforce the rent and covenants. Every one of those rights is provided for him by the statute. How then can it be contended that, in an ordinary case,

compensation is not given to him for the loss of his reversion? What he had before was the rent and renewal fines, and a legal remedy to recover them. Those are in terms given or compensated for by the statute: The 5th section of itself shows, that that was the intention of the Legislature. It provides that, "Where the estate into which the reversion, from the owner of which a grant is required as aforesaid, would be converted upon such grant under the provisions herein before contained, would not afford a full compensation for the loss of such reversion, or for any power, benefit or advantage incident thereto, or exercised or enjoyed by or under any local or personal Act of Parliament," &c. Those words plainly show that by the compensation provided by the previous section, the Legislature intended, in an ordinary case, to give compensation for the loss of the reversion, for every thing which the landlord was entitled to, having regard to the original contract, and which was in terms comprised in, and provided for, by the previous sections.—[The MASTER OF THE ROLLS. What is your construction of the 5th section, and what cases fall within it?].—What a landlord must show, to bring himself within the 5th section, is, not that the estate, which the tenant has after the conversion of it is more valuable than it was before, but that his reversion is more valuable than that which the landlord ordinarily has in a case of the kind. That is the proposition which he must establish. He must show that, in giving him the legal remedies for the rent and renewal fines, and the covenants, he has not been secured something which, under the original contract he would have been entitled to, or which by the original contract it was intended to secure to him. In an ordinary case, the statute has provided compensation. What the Legislature meant by the reversion is what, according to the true construction of the original contract, the landlord meant to retain to himself, and the question under the 5th section is, whether that has been secured to him by the previous sections? In an ordinary case, the landlord's rights are those stated by Lord Redesdale in *Lennon v. Napper*. If it turns out that the case is exceptional, and that there were, by the original contract, benefits annexed to the reversion, which made it of greater value than an ordinary reversion, but which a Court of Law would

1854.

*Rolls.*

*Ex parte*  
**KNOX.**

*Argument.*

1854.  
Rolls.  
Ex parte  
KNOX.  
Argument.

not give him, then he may get compensation for the loss of those benefits, under the 5th section, but in no other case.

The *Attorney-General*, Mr. Major, and Mr. *Dominick McCausland*, for the respondents.

It was not intended by the statute to lessen the property of the landlord and increase that of the tenant, or to make any change in the relative value of their respective estates. The landlord has a reversion and its incidents, which are of a certain value, and the tenant has an estate subject to those rights. It appears that the tenant's interest in this case will by the conversion be increased by two years' value. It follows that the landlord's interest is deteriorated to the same amount, and therefore the effect of the construction of the Act contended for would be to take two years' value from the landlord, and to give it to the tenant. The 5th section enacts that where the estate, into which the reversion from the owner of which a grant is required, would not afford full compensation for the loss of such reversion, the owner of such reversion may require such loss to be compensated. Suppose it is clearly ascertained that before the conversion the fee-simple would bring twenty-two years' purchase, and after it only twenty, ought not the Court to be astute to avoid a construction which would operate so unjustly, and so much at variance with the well recognised principle that the Legislature ought not to interfere with contracts? There was no affidavit in *Ex parte Somerville*, which showed that the landlord sustained any loss. There is no doubt that a landlord who has made a lease of this kind has something to dispose of, something that he can bring into the market to offer for sale. The Legislature did not intend to deprive him of that, and to vest it in the tenant, without any equivalent. The intention was to put an end to litigation, not to interfere with the rights of either party; and the Court acted on that principle in *Ex parte Waldron* (a), where it was held that the covenants in the fee-farm grant should be modified, so as not to interfere with the existing rights of the landlord. The position of the parties before

(a) 1 Ir. Ch. Rep. 269.

the Act was this:—the landlord had a reversion which he could not be compelled to convey to the tenant. He might ask any sum for it which he thought proper. The Legislature intervened, and, acting on the principle on which it has acted in Railway Acts, it provided a machinery by which the landlord should be compelled to give the reversion for a reasonable price. The compensation clauses in the Act are from the first to the fifth inclusive. There can be no question as to the meaning of the 1st and 2nd sections. They provide for the amount of the rent to be reserved whether a fine was payable or not. The 3rd section provides for exceptions or reservations which interfere with the cultivation of the land. Those sections show that the Legislature acted on the principle of making the tenant pay for every thing which was of any value to the landlord. Then comes the 5th section, which amounts substantially to this:—where there is a difference between the marketable value of the reversion, and that into which it is converted, the landlord is entitled to compensation, such compensation to be measured according to the difference in marketable value between the old reversion and the new estate. That section is clearly applicable to the case of an owner in fee, and if so it is applicable to any other case, *ex. gr.*, to the case of a tenant for life; for where an estate is settled, the reversion is divided between the tenant for life and the remainderman, and by joining they can sell the reversion. In the case of trustees for a charity, who are restrained from selling without leave of the Court, the marketable value would be estimated as if they had the leave of the Court. Therefore if the 5th section applies to the case of a tenant in fee, it must apply to every case which can come before the Court. It has been suggested that because the 5th section would seem to provide a gross sum for compensation, instead of increasing the rent, it is not applicable to the case of a tenant for life. But he may be entitled to the interest of that sum only, and be a trustee for the owners of the inheritance as to the principal. In fact the 5th section applies to every case in which it can be shown that the reversion on a lease for lives renewable for ever can be sold in the market for a greater sum than the fee-farm rent would sell for.

1854.

*Rolls.**Ex parte*

KNOX.

*Argument.*

1854.

Rolls.

Es parte  
KNOX.

Argument.

Mr. *Twigg*, in reply.

The true intention to be collected from the general scope of the Act, and from the 1st and 2nd sections, is to give no compensation in any case for the mere loss of the reversion, where such loss was not accompanied with some special injury.

It was intended to place the parties in precisely the same position in which they would have been if every covenant were performed and the contract carried out in its integrity. In such case there would have been perpetually subsisting a legal estate between the owner of the reversion and the landlord. The Act did for the tenant, at one stroke, what before he had to do for himself from time to time, and at his own expense; but it did this without depriving the landlord of a single right which he before possessed, every possible right being saved to him under the 7th and 9th sections.

The first consideration which would occur to the framer of the Act is, whether the owner of the reversion should be entitled in every case to claim compensation for the mere loss of the reversion, a loss which, *valeat quantum*, occurs in every case; and if such intention existed, it would have been unmistakeably expressed, as it was in the other sections, where compensation was provided for commuted covenants.

From the general scope of the Act, as well as from the introductory words of the 5th section, it is plain that that section was exceptional. The difficulty is, to discover what were the exceptional cases that came within it.

There are cases where owners of the reversion would sustain special injury by the loss of the reversion, for which they ought to have compensation, and which the 5th section might have been intended to meet, *ex. gr.*, where there are valuable covenants in leases not running with the land. In such cases one principal security which the landlord has for enforcing these covenants is the power of withholding a renewal in case of their being broken, and the power of obliging the assignee of the original covenantor to enter into these covenants on taking out a renewal. Suppose a case where a landlord makes leases, reserving to himself the timber, with a covenant by his tenants not to lop or injure it; this is a covenant not running

with the land, and therefore not binding the assignees of the covenantor; and the landlord's only hold over them was, by retaining the right to renew in his own hands; but once a fee-farm grant is obtained by the original covenantor, he might assign, and the landlord would have no remedy against his assignee. The case of the Society was an instance of this. They had covenants in their leases for the protection of their fisheries, which did not run with the land; and on this very ground, in their petition to Parliament, they claimed to be exempted from the operation of the Act. The Legislature removed this complaint by making these covenants run with the land; but if they had not done so, the Society might have fairly claimed compensation under the 5th section.

The loss contemplated by the 5th section was a loss sustained upon the conversion and by the conversion of the estate; but the loss for which the Society claim compensation, viz., the loss of the right to sell perpetual estates to their tenants, is not a loss sustained by and upon the conversion of their estate, but (if a loss at all) is a loss sustained by and upon the passing of the Act of Parliament, because immediately on the passing of the Act the tenants' right to demand such perpetual estates attaches.

It was never intended that a mere affidavit of loss was to entitle the owner of the reversion to compensation, otherwise an affidavit in every case would become a common form; and even if a positive affidavit of loss would entitle the owner of the reversion to compensation, the affidavit on the part of the Society is not sufficient, but is founded on an hypothesis which is false in point of law. The affidavit states, that the Society would have obtained from their tenants the value of two years' rent for *similar* grants to those made under the Act. But it is quite plain that, since the Statute of *Quia Emptores*, no owner in fee could have created similar estates to those which are created under this Act. If the Society had dealt with their tenants for perpetual estates before the passing of the Act, they could only have reserved a rentcharge on such estates, which is of much less value than a rent-service; and it is plain that whatever they had gained from their tenants on such a transaction, they would have lost in the value of the rent, upon a subsequent sale of it.

1854.

*Rolls.**Ex parte*  
KNOX.*Argument.*

1854.

*Rolls.**Ex parte*  
KNOX.*Feb. 14.**Judgment.*

## The MASTER OF THE ROLLS.

In this case a petition has been presented by the petitioner Samuel Knox, Esq., under the provisions of the Renewable Leasehold Conversion Act (12 & 13 of *The Queen*, c. 105, s. 22), against the respondents (commonly called the Irish Society), praying that a grant in fee-farm may be executed by the respondents to the petitioner, under the provisions of the said Act, of the messuage, lands and tenements demised by the lease in the petition mentioned (which lease bears date the 29th of September 1830); and further, praying the usual consequential directions.

[The MASTER OF THE ROLLS, having stated the facts of the case, proceeded as follows]:—

The Irish Society have not served a notice under the provisions contained in the latter part of the 1st section of the statute, stating that the right of the petitioner to require a grant in fee-farm is disputed; nor do they, by their Counsel, dispute such right.

The only question which has been raised, or upon which the Court is called upon to decide, is, whether, upon the true construction of the 5th section of the Act, the Irish Society are entitled to compensation for the loss which, according to the affidavit of Mr. Maurice Collis (and which affidavit is uncontradicted), will take place in the marketable value of their interest in the lands demised by the lease of the 29th of September 1830, by the conversion of their estate in the reversion into an estate in the fee-farm rent.

The part of the 5th section on which the question arises is as follows:—"Provided also, that where the estate into which the reversion (from the owner of which a grant is required as aforesaid) would be converted upon such grant under the provisions hereinbefore contained, would not afford full compensation for the loss of such reversion, or of any power, benefit or advantage incident thereto, or exercised or enjoyed by or on behalf of the owner thereof, *under any local or personal Act of Parliament, charter, settlement or otherwise*, the owner of such reversion may require such loss to be compensated by such an addition in respect thereof to the fee-farm rent to be made payable under such grant, or, at the option of the owner of such reversion, by the payment of such a

gross sum of money (the amount in either case to be ascertained as hereinafter mentioned, in case the parties differ about the same), as will afford a full compensation for such loss, to be estimated according to the difference in marketable value."

The remainder of the section does not apply to the present case.

The question under that section is, whether the Irish Society (who, it is stated in the petition, were seised in fee, when they made the lease under which the petitioner claims to be entitled, and who are now the owners of the reversion in fee) are entitled to compensation for the loss which, it would appear from the said affidavit of Mr. Maurice Collis, will take place in the marketable value of their estate in the lands demised, by the conversion of their estate in the reversion to an estate in the fee-farm rent?

No affidavit has been made on the part of the petitioner, denying the statement in Mr. Maurice Collis' affidavit.

The petitioner's Counsel contend that, according to the true construction of the 5th section of the statute, the Irish Society are not entitled to any compensation for the said alleged loss; and that that section does not apply to a case where the landlord was seised in fee when he made the lease, and when the Act was passed, although he continued so seised at the time when the petition for the fee-farm grant is presented.

I have been unable to obtain from the petitioner's Counsel any satisfactory reply to the inquiry which I have made as to what, according to their view, is the construction to be put on the 5th section, or what cases fall within its provisions.

The Renewable Leasehold Conversion Act was brought in in the House of Lords in the year 1849, by the then Lord Chancellor of England, and the 5th section was added to the bill on the third reading in the Lords.

The difficulty which arises in construing a statute, where alterations are made in the progress of the bill through either House of Parliament, without submitting the alterations to the person who prepared the measure, was observed on by Lord Lyndhurst and Lord St. Leonards in the course of the last session (a).

(a) See debate on the 14th of March 1853, on the codification of the Statute Law, reported in *Hansard*, vol. 125, p. 133.

1854.  
Rolls.  
Ex parte  
KNOX.  
Judgment.

1854.

*Rolls.**Ex parte*  
KNOX.*Judgment.*

In determining the question whether, under the 5th section of the statute, the Irish Society is entitled to compensation for the loss or alleged loss which it is said will take place in the marketable value of their interest in the lands and premises demised by the indenture of the 29th of September 1830, by the extinction of the reversion and the conversion of the estate in such reversion to an estate in the fee-farm rent, it will be convenient (as that section was added to the bill in the House of Lords on the third reading) to consider—first, what was the general scope of the Renewable Leasehold Conversion Act without the 5th clause; and secondly, to ascertain whether that section is to be construed as a general provision and enactment, applying to every case under the Act—or whether it is a provision applicable only to certain exceptional cases; and if it be an exceptional section, whether the present case falls within its provisions?

I shall therefore consider—first, what was the general scope and object of the Act, excluding the 5th section from consideration—which section, as I have already stated, was not in the bill when it was brought in in the Lords.

The Act was founded on the report of the Commissioners appointed to inquire into the occupation of land in Ireland. One of the witnesses examined before the Commissioners gave evidence in relation to the leases of the Irish Society.

The preamble of the Act (which is in accordance with the report of the Commissioners and the evidence on which it is founded) recites that—“Whereas many lands in Ireland are held under leases and under-leases respectively, with covenants for perpetual renewal, and great expense is constantly incurred in procuring renewals under such covenants, and much litigation and inconvenience arise from such tenures, and it is expedient that such tenures should be converted in manner hereinafter mentioned into tenures in fee; and that except, as herein excepted, all leases and under-leases of lands in Ireland, with covenants for perpetual renewal, granted or made after the passing of this Act, should operate and take effect in manner hereinafter mentioned.” And after such preamble, it is by the 1st section enacted, “That where lands in Ireland are held

under any lease in perpetuity, the owner of such lease in perpetuity, at any time after the passing of the Act, and whether the time for renewal has or has not arrived, may require the owner of the reversion to execute a grant, according to the provisions of this Act, of the lands comprised in such lease; and the owner of the reversion, upon being so required as aforesaid, shall execute a grant to the owner of such lease, of an estate of inheritance in fee-simple in such lands, subject to a perpetual yearly fee-farm rent of such amount as hereinafter mentioned, to be charged upon such lands, and to be payable on the same days and times as the yearly rent made payable by such lease; and subject to the like covenants and conditions, for securing the payment of such fee-farm rent, as are contained in such lease with respect to the rent thereby reserved; and with and subject to such other covenants, conditions, exceptions and reservations (save covenants to grant or to accept and take a renewal of such lease, and such covenants, conditions, exceptions and reservations as may be commuted as hereinafter mentioned), as are contained in such lease, and then subsisting."

The 1st section then contains a similar provision as to the owners of an under-lease in perpetuity, and provides that the expense of the preparation of the grant and counterpart shall be paid by the owner of the lease, and that all arrears of rent, and the fines, if any, shall be paid before the execution of the grant; and the section concludes with a proviso:—"That no owner, required to execute any such grant as aforesaid, shall be obliged to execute such grant, where the right of renewal is lost both at law and in equity: and where any owner, required to execute any such grant as aforesaid, disputes the right of the party requiring such grant to require the execution of such grant, such owner shall, within one calendar month after he is so required as aforesaid, serve on the person, by whom such grant has been required, a notice in writing stating that the right to require such grant is disputed, and the grounds on which such right is so disputed."

I have already stated that no such notice has been served on the part of the respondents. The 2nd section enacts:—"That the fee-farm rent to be made payable by every such grant as aforesaid

1854.  
Rolls.  
Ex parte  
KNOX.  
Judgment.

1854.  
*Rolls.*  
*Ex parte*  
 KNOX.  
 —  
*Judgment.*

shall, where the lease or under-lease (as the case may be), to the owner of which the grant is made, is renewable without fine, or upon payment of a peppercorn or other merely nominal fine of like nature, be of the like amount as the yearly rent made payable by such lease or under-lease; and shall, where such lease or under-lease is renewable upon payment of a fine or fines not merely nominal, be of an amount equal to the aggregate amount of the yearly rent, made payable by such lease or under-lease, and the value of the renewal fine, or fines and fees (if any); such value to be estimated or computed with regard to the probable duration of life, and the respective periods for renewal, but without regard to, and exclusively of, any penal rents or sums made payable upon neglect, delay, or refusal to apply for or take renewal, and to be ascertained as hereinafter mentioned, if the parties differ about the same."

The 3rd and 4th sections contain certain provisions as to the commutation of exceptions or reservations which interfere with the cultivation of the lands comprised in the lease, and the cesser, with the consent of the reversioner, of exceptions of timber, mines, &c.; and the fee-farm rent is to be increased by such an amount as is equivalent to the value of such exception, reservation, or right; but no question arises in this case on the 3rd and 4th sections, as the petitioner does not seek for the commutation or cesser of any exception or reservation in the lease of the 29th of September 1830.

The effect of the extinction of the reversion by the grant of the fee to the owner of the lease would of course, without express provision in the statute to the contrary, have deprived the landlord of many of his rights. The rent reserved would have been recoverable only as a rentcharge. In a note of Mr. *Hargrave's Co. Lit.* 143, *b*, he states:—"After the Statute of *Quia Emptores*, granting in fee-farm, except by the King, became impracticable, because the grantor, parting with the fee, is, by operation of that statute, without any reversion, and without a reversion there cannot be a rent-service, as *Littleton* himself writes in section 216; yet I have seen a modern grant in fee of a large estate in Ireland,

reserving a perpetual rent of great value. But such rent, considered as a fee-farm rent, I thought clearly void. However, as in the case I allude to, the conveyance contained a power for the grantor and his heirs and assigns to distrain for the rent when in arrear, and also a power to enter and receive the profits, until all arrears should be paid, the rent might be considered good as a rentcharge, and so, on being consulted, I held it to be." In order to provide a remedy for this difficulty, the enactments in the 7th, 10th, 13th, 20th and 21st sections were introduced.

The 7th section enacts that the "Reversion shall be converted into an estate of inheritance in fee-simple in the fee-farm rent made payable by such grant, and the conditions, exceptions and reservations therein contained, and all rights annexed or belonging to such reversion, saved by and not commuted under this Act." And then, after similar provisions where a grant is made by the owner of an under-lease in perpetuity, it is further enacted that "Each such estate of inheritance in fee-simple as aforesaid shall be transmissible and descendible in like manner as if the same were an estate of inheritance in fee-simple in reversion in the lands, on which the fee-farm rent is charged by the grant creating the same, having incident thereto the conditions, exceptions and reservations contained in the same grant, and such rights respectively as aforesaid." And it is also provided that the estate of inheritance, created in such fee-farm rents, shall be vested in the same persons for the same estates and interests, and subject to the same uses, &c., and charged with the same incumbrances, &c., as the reversion or estate by the owner of which the grant was made were respectively vested in, subject to, and charged, &c.

The 10th section contains provisions as to covenants running with the land, so as to place the reversioner and the tenant in the same position in which they would have been if the estate in the reversion had not been converted into an estate in the fee-farm rent, and as if the estate of the tenant had continued a sub-interest, and was not a grant in fee-farm.

The 13th section also contains some provisions having the same object in view.

1854.

*Rolls.*

*Ex parte*  
KNOX.

*Judgment.*

1854.  
*Rolls.*  
*Ex parte*  
 KNOX.  
 ———  
*Judgment.*

The 20th section enacts that the fee-farm rent made payable by any grant under this Act shall be recoverable by distress, ejectment for non-payment of rent, action of debt, covenant, and all other ways, means, remedies, actions, suits, or otherwise, by which rent-service on any common lease or demise for a life or lives is or may be by law recoverable; and it is further provided that all enactments relating to ejectments for non-payment of rent, distress, or other remedies for recovery thereof, shall apply to every such fee-farm rent as aforesaid, as fully and effectually as if the same were a rent-service reserved on a lease for life or lives; and the section then contains special provisions fully to effectuate such objects.

The 21st section contains provisions having the same object in view.

Enactments then follow as to the mode of proceeding where the right to a fee-farm grant is disputed, and for carrying into effect the general scope and intention of the statute; and the result appears to be that the bill, as introduced in the Lords, intended to put an end to the expense, litigation, and inconvenience, arising from the tenure under leases renewable for ever, by converting that which in equity was considered a perpetual estate or interest into a perpetual estate or interest at law; and thus to relieve the tenant and parties deriving under him from the danger of forfeiture, arising from his neglecting to renew. As the effect, however, of the landlord granting in fee-farm, and parting with his reversion, would have been to deprive him of the ordinary remedies for the recovery of the rent, and other rights incident to a reversion, the enactments I have mentioned were introduced to create tenure between the landlord and tenant, notwithstanding the Statute of *Quia Emptores*, and to place the parties in the same relation in which they would have stood if that Act had never passed.

Previously to the Statute of *Quia Emptores*, a fee-farm rent was a rent-service. It ceased to be so by the operation of that Act (a); but in cases of grants under the Renewable Leasehold Conversion Act, the rent is a rent-service, and the relation of landlord and tenant subsists

(a) See *ante*, page 76.

by the provisions of the statute, although there is no reversion. The provisions in that respect were, by a subsequent statute (14 & 15 of *The Queen*, c. 20), extended to all fee-farm grants, except as to the remedy by ejectment for non-payment of rent.

It appears, however, to have been overlooked by the framer of the bill that, in those cases where the owner of the reversion had power, under "a private Act of Parliament, charter, settlement or otherwise" (a), to grant in fee to his tenant holding under a lease renewable for ever, such owner of the reversion could obtain from his tenant, desirous to obtain a grant in fee-farm, a sum of money by way of premium or consideration for such grant. The estate and interest of the tenant would of course be increased in value by the grant, and the tenant would therefore have been willing to pay a consideration therefor. The House of Lords accordingly appear to have considered that the marketable value of the estate in the reversion, where the owner of such reversion had power to convey in fee-farm to his tenant for a valuable consideration, would be greater than the estate in the fee-farm rent, to which it was to be converted under the statute, and that as the statute deprived the landlord of the power of contracting with his tenant or with any third party for the sale of such reversion, it would not be just to deprive the landlord of the estate in the reversion, for the grant of which he could obtain a valuable consideration, without giving compensation for the loss arising from the conversion of the estate in the reversion in fee, to an estate in the fee-farm rent.

Accordingly, with the object of providing compensation in certain cases to the owner of a reversion, from whom a grant in fee-farm was required, the 5th section was inserted by the House of Lords. I shall therefore, secondly, proceed to consider whether that section is to be construed as a general provision applying to every case under the Act, or whether it is a provision applicable only to certain exceptional cases; and if it be an exceptional section, whether the present case falls within its provisions.

In order to ascertain the circumstances under which the 5th clause was added to the bill, I have obtained from the officer of the

1854.  
Rolls.  
*Es parte*  
KNOX.  
Judgment.

(a) These are the words in the 5th section.

1854.  
*Rolls.*  
*Ex parte*  
 KNOX.  
 —  
*Judgment.*

House of Lords copies of the several prints of the Renewable Leasehold Conversion bill, from its introduction to its passing through that House; as also printed copies of the several amendments proposed during its progress through the House of Lords.

The bill was presented by Lord Cottenham (then Lord Chancellor), on the 2nd of April 1849.

The 5th section was not then in the bill.

The bill, having been read a second time, was amended in committee, and a section was added (the 5th in the copy of the bill, as amended in the committee of the House of Lords, and printed 21st May 1849), by which section it was provided and enacted, "That where, under the circumstances of the land comprised in any lease in perpetuity, by the owner of which a grant is required as aforesaid, the value of the estate into which the reversion would be converted upon such grant, under the provisions hereinbefore contained, would be less than the value of such reversion, the owner of such reversion may require such diminution in value to be compensated by an addition in respect thereof to the fee-farm rent to be made payable under such grant; the amount to be ascertained as hereinafter mentioned, in case the parties differ about the same." And then follow provisions making an under-lessee in perpetuity, who requires a grant under the Act, liable to such additional fee-farm rent, or a proportional part thereof.

I believe that clause was introduced on the motion of Lord Beaumont, acting on behalf of Lord Donegal; and I shall now state, from the documents to which I shall refer, what led to the introduction of that section, or, at all events, to the introduction and passing of the 5th section of the Act, as it was ultimately adopted on the third reading of the bill in the House of Lords.

In the year 1846, the Marquis of Donegal had obtained a private Act of Parliament, by which he was empowered to grant perpetual estates to tenants holding under him for lives renewable for ever.

The Act is the 9th of *The Queen*, c. 3, and received the royal assent on the 18th of June 1846.

The 1st section of that statute, after reciting a private Act

1854.  
Rolls.  
Ex parte  
KNOX.  
Judgment.

obtained by Lord Donegal (8 & 9 of *The Queen*, c. 31, authorising the sale of certain settled estates of his Lordship to pay off incumbrances), and reciting that, at the time of the passing of the said Act of the 8 & 9 of *The Queen*, divers parts, constituting the bulk of the estates, vested by the said Act in the trustees thereof, were let on leases for lives, with covenants for the perpetual renewal thereof; and reciting that said leases, or some of them, contain certain exceptions of timber, mines, &c., and other rights, royalties, &c.; and reciting that, inasmuch as many of the persons possessed of such leases as last aforesaid might be induced to surrender the same, and to accept in lieu thereof grants in fee-simple, at perpetual yearly rents, equal to or greater than the rents reserved by such leases respectively, and to pay sums of money as premiums or considerations for such grants; and reciting that, inasmuch as a large sum of money might be thereby raised for the purposes of the said recited private Act, without any reduction of the regular annual income of the said estates, it would be very beneficial to all persons interested, and to be interested in the said estates, if sufficient powers were given for effecting such grants. And after some other recitals, it was by said Act enacted that it should be lawful for George Hamilton, Marquis of Donegal, during his life, and after his demise, for the several and respective persons who, under the limitations for life and in tail contained in a certain settlement of the 28th of October 1822, should be entitled in remainder to the possession or receipt of the rents and profits of the lands, &c., comprised in said recited private Act, when in possession, by deed, sealed and delivered, and with the consent of the trustees, to grant and convey in fee-simple to any person or persons who should be possessed of, or entitled to, and should be willing to surrender his or their lease for lives renewable for ever—all or any of the lands comprised in any such leases for lives renewable for ever, either alone or together, with any trees, mines, &c., excepted out of such lease or leases, subject to the covenants and conditions therein mentioned; and in consideration of the surrender of such lease or leases respectively, and of the payment of such sum or sums of

1854.

*Rolls.**Ex parte*

KNOX.

*Judgment.*

money by way of premium, for the making of such grant or grants respectively, as to the person or persons making such grant or grants should seem reasonable; so as in and by such grant there should be reserved a yearly rent not less in amount than the yearly rent reserved by the lease so to be surrendered, and payable on the same days and times: and then follow provisions as to the grant containing clauses of distress and re-entry, a covenant for the payment of the rent, and other clauses and conditions not necessary to advert to.

The 2nd section of the said private Act contains a provision that the covenants and conditions in such grant shall be annexed to and incident to the estate in the rent, as they had previously been to the estate in the reversion; and by the 6th section the monies to be received by way of premium or consideration for such grants in fee-simple under the said private Act were to be applied to the purposes of the private Act recited therein—that is to say, amongst other matters, to pay off mortgages and other incumbrances.

The Marquis of Donegal thus had the right, under the private Act to which I have referred, to grant in fee-farm to tenants holding under leases for lives renewable for ever, subject to the restrictions I have stated, and had the right to require the payment of a gross sum by way of premium on the making of such grants.

The provisions of the Renewable Leasehold Conversion bill, as introduced in the House of Lords in 1849, obviously affected those rights granted by the Legislature to Lord Donegal in 1846; and accordingly Lord Beaumont gave notice of two clauses to be moved on the report, and which clauses were printed for the use of the Members of the House.

I have obtained from the House of Lords a printed copy of those clauses, headed—"Clauses to be moved on the report by the Lord Beaumont."

The first of those clauses is as follows:—"Provided also, and be it enacted, that no grant shall be required to be made under this Act, in any case where, at any time before the passing of this Act,

any private Act of Parliament shall have been obtained, empowering the owner or owners of any lands comprised in any lease or leases of lives in perpetuity, or any trustees or trustee, or other persons or person for or on behalf of such owners or owner, to convert the same lease or leases for lives in perpetuity into an estate or estates in fee-simple, subject to any fee-farm rent or rents."

The object of that clause appears to have been to exclude altogether the Marquis of Donegal's estates, and other estates similarly circumstanced, from the operation of the Renewable Leasehold Conversion Act.

Lord Beaumont, probably doubting that such clause would be eventually sanctioned by the House, gave notice of another clause to be moved on the report, which provided, amongst other matters, that where an owner, required to make a grant under the Act, would be enabled out of his estate, or under any power, by grant or otherwise, to convert, in pursuance of any contract or agreement to be entered into for that purpose, and for such consideration as should or might be agreed upon between the parties, any lease or leases in perpetuity into an estate in fee-simple, at and under the like yearly rent or rents as is or are received in or payable under such lease or leases in perpetuity, then, and in every such case, every such owner might require all fines and profits payable on every renewal, and any consideration for converting any lease or leases in perpetuity into an estate in fee-simple, to be rendered and paid in money at the time of such grant, instead of being commuted into and made payable as an additional fee-farm rent or rents, in or under the grant or grants to be made by the owner under this Act. And authority is then given to the lessee to raise such sum of money (to be paid as aforesaid), by mortgage, &c.

It appears, on referring to the printed copy of the bill in the House of Lords, "with the amendments made on the report," that the first clause moved by Lord Beaumont was added to the bill.

The other clause of Lord Beaumont's does not, however, appear to have been adopted. Indeed, the adoption of Lord Beaumont's first clause rendered the other unnecessary, so far at least as Lord Donegal was concerned.

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Rolls.  
Ex parte  
KNOX.  
Judgment.

1854.  
*Rolls.*  
*Ex parte*  
 KNOX.  
 —  
*Judgment.*

Lord Beaumont's first clause was inserted as the second clause in the bill on the report; and the clause which I stated to have been introduced in committee as the fifth clause became the 6th section. The Earl of Glengall gave notice of a clause to be proposed on the third reading; which clause was printed, and which is as follows:—  
 "And be it enacted, that nothing in this Act contained shall extend to any of the lands held by the Society of the Governors and Assistants, London, of the New Plantation in Ulster, within the realm of Ireland, under or by virtue of any charter or statute."

One clause having been thus adopted by the House of Lords on the bringing up of the report, excluding Lord Donegal's estates altogether from the operation of the bill, and Lord Glengall having given notice of moving a clause to exclude the estates of the Irish Society from the bill, an arrangement appears to have been entered into; and under these circumstances Lord Campbell gave notice of amendments, which were printed, and which are headed—  
 "Further amendments to be proposed on third reading by the Lord Campbell:"—

"To strike out clause 2" (*i. e.*, the clause of Lord Beaumont's, inserted on the bringing up of the report). "For clause 6, to substitute the following clause:" and then follows a clause, which, with some alterations, became the 5th section of the Renewable Leasehold Conversion Act, on which section the question arises.

The second clause of the bill introduced by Lord Beaumont on the bringing up of the report, and which would have altogether excluded Lord Donegal's case and similar cases from the Act, was struck out on the third reading. Lord Glengall's clause, excluding the Irish Society, was not adopted; and Lord Campbell's clause, with some alterations, was substituted for the section which was number 6 in the bill, as printed after being reported to the House; and it will be right to refer again to the latter clause, which was struck out, and in lieu of which the 5th section of the Act was substituted. It was as follows:—[The MASTER OF THE ROLLS again read the clause, stated *ante*, page 80.]

If Lord Campbell, who proposed the introduction of the 5th section of the Act, on the third reading of the bill, in lieu

of the clause I have just stated, had intended, or if the House of Lords had intended, to introduce an enactment which in every case would have entitled the owner of a reversion to compensation for the conversion of the estate in the reversion to an estate in the fee-farm rent, the alteration of a few words in the clause I have just read, and which was struck out, would have effectuated that object; but instead of that course being adopted, a new clause (the present 5th section of the Act) was adopted, which from its terms was, I apprehend, intended to include Lord Donegal's and similar cases, but the language of which appears to be inconsistent with the notion that it was intended as a general and not an exceptional enactment. The difficulty, therefore, is to ascertain (assuming it not to be a general enactment) what are the exceptional cases within its provisions.

The 5th section, as it was finally adopted in the statute, will be more easily understood after what I have stated, and is as follows:—

“Provided also, and be it enacted, that where the estate into which the reversion (from the owner of which a grant is required as aforesaid) would be converted upon such grant, under the provisions hereinbefore contained, would not afford full compensation for the loss of such reversion, or of any power, benefit, or advantage incident thereto, or exercised or enjoyed by or on behalf of the owner thereof, under any local or personal Act of Parliament, charter, settlement, or otherwise, the owner of such reversion may require such loss to be compensated, by such addition in respect thereof to the fee-farm rent to be made payable under such grant, or, at the option of the owner of such reversion, by the payment of such a gross sum of money (the amount in either case to be ascertained in manner hereinafter mentioned, if the parties differ about the same) as will afford a full compensation for such loss, to be estimated according to the difference in marketable value.” What follows in such 5th section does not appear to me to affect the question.

If, previously to the statute, the owner of the reversion had power “under a local or personal Act of Parliament, charter, settlement, or otherwise,” to convey in fee or in fee-farm, on payment of a sum

1854.

*Rolls.*

*Ex parte*  
KNOX.

*Judgment.*

1854.

*Rolls.**Ex parte*  
KNOX.*Judgment.*

of money by way of premium or consideration, the conversion of the estate in the reversion into an estate in the fee-farm rent would not afford full compensation for the loss of such reversion, and of the right to contract with the tenant for such fee-farm grant.

Lord Donegal had, under the private Act of 1846, power to convey in fee or in fee-farm, with the assent of his trustees, to tenants holding under leases for lives renewable for ever, on payment of a sum of money, by way of consideration, but at a rent not less than that reserved by the leases.

There is not, I think, any doubt, under the circumstances I have stated, that the 5th section was framed to meet Lord Donegal's and similar cases.

If I was at liberty to refer to the debate in the House of Lords on the 8th and 18th of June 1849, as reported in *Hansard*, it would appear to be quite clear that the 5th section was introduced to meet Lord Donegal's case, and cases similar in principle; but I apprehend I cannot refer to what fell from noble Lords when the bill was passing through the House, consistently with the observations of Sir James Mansfield in *Iggulden v. May* (a). I think, however, I am justified, without any violation of legal principles, to refer to Lord Donegal's private Act, passed in 1846, and to the other circumstances to which I have adverted. But even if I were not at liberty to do so, I should, upon the language of the fifth clause, and without reference to any extraneous circumstances, arrive at the same conclusion.

If Lord Donegal, or his trustees, would be entitled, under the 5th section, to compensation for the loss arising from the conversion of the estate in the reversion to an estate in the fee-farm rent, I am unable to understand what sound distinction there is between such case and the case of a reversioner seised in fee; and who, by virtue of his seisin in fee, and without any private Act of Parliament, had the power to convey, which Lord Donegal and his trustees had, under the private Act to which I have referred.

The only distinction between the two cases is, that Lord Donegal and his trustees would, at the time of the passing of the Renewable

(a) 2 New Rep. 451.

Leasehold Conversion Act, have continued, by the terms of the private Act, in the position of landlord, notwithstanding the conveyance of their reversion ; whereas a person seised in fee, conveying in fee, subject to a rent, would only have been entitled to a rentcharge, on the principles stated by Mr. *Hargrave* in the note I have referred to. Still, however, the effect of the Renewable Leasehold Conversion Act would be to deprive the reversioner of a right capable of being transferred for valuable consideration, without any further inconvenience to the landlord, than having his estate in the reversion converted into an estate in a rentcharge ; and the conversion by the Act of what would have been an estate in a rentcharge to an estate in a rent-service would scarcely have been a sufficient compensation for the loss of the right to transfer the estate in the reversion for valuable consideration. By the operation, however, of the 14 & 15 of *The Queen*, c. 20, an owner in fee can now convey in fee-farm, and the rent would be a rent-service.

The words of the 5th section, "under any local or personal Act of Parliament, charter or otherwise," should be kept in mind in construing that section. The word "charter" may, perhaps, have been introduced to meet the case of the Irish Society ; but as the charter has not been put in issue, that cannot be relied on in this case.

I therefore am of opinion, having regard to the language of the 5th clause, and to the affidavit of Mr. Maurice Collis, that the respondents, as the owners in fee of the reversion in the lands demised by the lease of the 29th of September 1830, are entitled to compensation for the loss which, it appears from that uncontradicted affidavit, will arise from the conversion of their estate in the reversion to an estate in the fee-farm rent ; and I must, therefore, refer it to the Master to ascertain the amount of such compensation.

Two cases have been referred to in the course of the argument, in which the construction of the 5th section of the Act was considered, to which it will be proper to advert.

The first is the case of *Ex parte Somerville*. In that case, which is shortly reported in the 2nd vol. of the *Irish Jurist*, p. 203, I decided that the 5th section of the statute did not entitle the owner of the reversion to compensation in every case for the con-

1854.  
Rolls.  

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Ex parte  
KNOX.  

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Judgment.

1854.

Rolls.

*Ex parte*

KNOX.

*Judgment.*

version of the estate in the reversion to an estate in the fee-farm rent. The facts of the case are not stated in the report; but it appears from the order—a copy of which I have obtained—and from the documents used on the motion, which I have read, that no affidavit was filed on the part of the respondents; nor was there any evidence laid before the Court that there was a loss to the respondents in that case by the conversion of the estate in the reversion to an estate in the fee-farm rent.

The principal argument urged before me was, that the landlord was entitled to compensation, by reason of the statute having deprived him of the right to litigate, and of the chance of a forfeiture, by reason of the neglect of the tenant to renew. I did not concur in that argument: but I am not at all certain, if the case of *Ex parte Somerville* had been argued on the same grounds upon which this case has been argued, and if an affidavit had been made, to the same effect as the affidavit filed by Maurice Collis in the present case, that I should have made the declaration contained in the order in that case.

The case of *Ex parte Somerville* was decided on the 4th of May 1850, and shortly afterwards a bill was brought in in the House of Lords, to amend the Renewable Leasehold Conversion Act, which, after reciting the 5th section of the said Act, and reciting that doubts are entertained as to the intent and meaning of the proviso and enactment contained in the said 5th section of the said Act, it was, by the 1st section of such bill, provided, "That where, under the provisions of the said Act, a grant of the inheritance in fee-simple is required by a lessee in perpetuity of any lands from the owner of the reversion, the difference in marketable value between the reversionary estate to be granted or conveyed, and the value of the fee-farm rent of the same amount as the rent reserved in such lease, shall be deemed to be a loss, for which the owner of such reversion may require to be compensated, under the recited proviso and enactment; and such compensation shall be made and given by an increase in the amount of the fee-farm rent, equivalent in value to the amount of such loss: provided always that the owner of any reversion, of which a grant may be required, under the provisions of the said recited Act, shall in no case be entitled to claim or

receive compensation for or on account of any loss which may be sustained by such owner, by reason of such grant, greater than the amount of one year and a-half of the rent reserved in any such lease."

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Rolls.  
*Es parte*  
KNOX.  
Judgment.

And by the 2nd section of the bill, it was proposed to be enacted, "That so much of the said Act as provides that compensation for any loss or difference in value between the reversionary estate and interest required to be granted, and the value of the fee-farm rent to be thereafter reserved, may be compensated by the payment of a gross sum, shall be, and is hereby repealed, and, in future, compensation for any such loss shall be made by a proportionate increase in the fee-farm rent to be reserved."

That bill passed the House of Lords, and was sent to the House of Commons on the 1st of August 1850, as appears on the copy of the bill ordered by the House of Commons to be printed.

It was not, however, proceeded with in that House, and has not been again brought in in either House of Parliament.

The case of the Corporation of Belfast and the Marquis of Donegal and others came before me on the 15th of July 1851. The Marquis of Donegal or his trustees returned no answer to the different notices served upon them by the petitioners in that case, prior to the case being heard before me, and filed no affidavit. A short affidavit was filed by the receiver over Lord Donegal's estates, which did not properly raise the question which has been argued in this case. No affidavit was made to the effect of the affidavit made by Maurice Collis in the present case; and the attention of the Court not having been called to Lord Donegal's private Act, or to any of the arguments arising therefrom, or to the facts which I have stated, I followed the case of *Es parte Somerville*.

There was an appeal in that case to the Lord Chancellor, who affirmed my decision; and I presume his Lordship's attention was not called to the facts I have adverted to, which appear very clearly to establish that the decision ought to have been otherwise, if the case of Lord Donegal had been properly brought before the Court.

If the present petition was against Lord Donegal and his trustees, I should probably have felt obliged to follow the Lord Chancellor's decision; but as that case is not reported, and as I am unaware of

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Rolls.

*Ex parte*  
KNOX.

—  
Judgment.

the grounds of his Lordship's decision, and as the facts of the present case are not exactly the same, I apprehend I am bound to decide according to the view I entertain of the law, after having very carefully considered the subject.

A circumstance occurred during the progress of the argument, to which I think it is proper to advert.

In the case of *The Skinners Company v. The Irish Society*, reported in 12 *Clarke & Finnelly*, p. 425, it appears that that Society hold their property under a charter from King *Charles 2*, and although the House of Lords decided that the Irish Society were not trustees for the *Skinners Company*, yet it was considered that they were trustees for public purposes.

I suggested the propriety of the petitioner or respondents putting the charter in issue, and consenting (in order to save expense) that the printed copy used before the House of Lords should be read. The petitioner has declined to amend his petition, and put the charter in issue, or consent to its being laid before the Court; and the respondents have also declined to put it in issue, or to consent to its being read. I am therefore obliged to decide the case without regard to the consideration that the respondents are trustees for public charitable purposes.

The reason why it occurred to me that it would be desirable that the charter should be in issue, was this:—It is quite clear, as laid down by Lord Cottenham, in the case of the *Attorney-General v. Pilgrim (a)*, that it is “an established rule of this Court, which it is its duty to maintain, that leases of this sort (that is, long leases of charity lands) amounting to an alienation, are, *prima facie* at least, not to be supported.”

If the charter had been put in issue, the petitioner, without any inconsistency, notwithstanding the general rule as laid down by Lord Cottenham, would have been at liberty to contend that the lease under which he derived was valid, according to the authority of the *Attorney-General v. Hungerford (b)*,\* and at

(a) 2 H. & Tw. 188.

(b) 2 Cl. & Fin. 357; S. C. 8 Bligh, 437.

\* See the pamphlet recently laid before the Commissioners of Inquiry into the state of the Corporation of London, and the documents referred to in said pamphlet.

the same time to have insisted that, according to the case of the *Attorney-General v. Kerr* (a), and many other cases, the Irish Society could not, *prima facie* at least, have conveyed their reversion in fee-farm previously to the Renewable Leasehold Conversion Act, and could not now convey in fee-farm if that statute had not passed; and that, as there would perhaps be no marketable value attached to an estate in a reversion, incapable *prima facie* of alienation, in consequence of the estate being subject to a public charitable trust, there could be no loss by the conversion of the estate in the reversion into an estate in the fee-farm rent.

I am not at liberty to enter upon that question, Counsel on each side having declined (notwithstanding the suggestion of the Court that the case should be argued on the real facts) to put the charter in issue.

I wish it, however, to be distinctly understood, that I offer no opinion whatever on the point, as it may be argued on some future occasion.

It was stated in the course of the argument by Counsel on the part of the Irish Society, that the compensation which they would claim under the 5th section of the Act from their tenants, in the event of their all seeking for fee-farm grants under the statute, would exceed £100,000.

It was not, however, stated by Counsel, how the Irish Society proposed to expend that sum; and if I may judge from the account laid before the House of Lords, in *The Skinners Company v. The Irish Society* (b), no portion of it would be expended in Ireland. What proportion of the property of the Society is expended in the performance of the public trusts reposed in them, may properly be the subject of inquiry before the commission now sitting in London.

In the case in the House of Lords, to which I have referred,

(a) 2 Beav. 427.

(b) 12 Cl. & Fin. 451.

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Rolls.  
Ex parte  
KNOX.  
Judgment.

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which was printed in 1854; and amongst others, the letter from the Irish Society to their tenants, bearing date the 30th August 1766, in pursuance of which the leases for lives renewable for ever were granted to the tenants of the Irish Society about that period, under circumstances, and upon terms very beneficial to the said Society.

1854.

*Rolls.**Ex parte*  
KNOX.*Judgment.*

Lord Lyndhurst, in giving judgment, observed that the Irish Society "have to provide for the Protestant religion, the Protestant establishment in that district. That is not a temporary but a permanent object; and, with the establishment of religion in that district, they have also to superintend and take care of that which is closely and intimately connected with religion, and a part of it (if I may so describe it), namely, the education of the inhabitants of the district: they have also to perform other public duties, of great importance, connected with the district—duties, as it appears to me, from the very nature and character of them, of a permanent description; and it appears to me that there is no foundation whatever for the argument which has been urged, that their authority as public officers has long since expired, and that they have no duties to discharge."

In the course of the present sittings, I had an injunction motion before me, in which two private bills were handed up to the Court (and which bills it is proposed to bring in in the present session of Parliament), to authorise the building of quays, and for other important public purposes, at Londonderry; I believe it is also necessary to build a bridge there. The inhabitants of Londonderry are to be heavily taxed for these public objects, and they are, in addition, according to the statement of Counsel for the Irish Society, to have the sum of £100,000 levied upon them by the Society, under the Renewable Leasehold Conversion Act, no part of which will probably be applied towards any public object connected with Ulster, unless a different course should be adopted from that which appears, from the accounts laid before the House of Lords, and to which I have referred, to have been hitherto pursued. The question, however, will no doubt be carefully considered by the Commissioners now sitting in London, and the expenditure of the funds of the Irish Society fully inquired into.

I have decided the question in the present case with the Irish Society on strict legal principles:—whether they have been well advised to insist on a right which has only been claimed by two Irish landlords, notwithstanding the number of fee-farm grants made under the statute, remains to be ascertained.

A question has, I believe, arisen as to whether there can be an appeal to the House of Lords against the decision of the Court in cases under the Renewable Leasehold Conversion Act, or from the decision of the Lord Chancellor on appeal?

I apprehend it will be found that an appeal lies to the House of Lords in all cases where jurisdiction is given to the *Court of Chancery*. The 22nd section of the Renewable Leasehold Conversion Act gives such jurisdiction. If authority is given to the Lord Chancellor alone by statute, some question would arise as to the right of appeal to the House of Lords; but I apprehend, where jurisdiction is given to the Court of Chancery, such jurisdiction is given subject, impliedly, to the right to appeal. The principal case on the subject is *Bignold v. Springfield* (a); and although the point was not decided in that case, it will, I think, be found that the opinion which Lord Brougham threw out is correct, and that on the grounds stated by Mr. Knight Bruce, who argued the question for the appellants, an appeal will lie (b). The observations of Lord Langdale, in the important case of *The Grand Junction Canal Company v. Dimes* (c), are important on this point.

It would be much to be regretted, in a case of such importance as the present, involving, I believe, in its results a question affecting the property of all the tenants of the respondents in the city of Londonderry, and in a considerable district outside the city, that the party against whom the decision may ultimately be in the Court of Chancery should be without a right of appeal to the House of Lords. If such be the law, it should be altered without a moment's delay.

I shall make an order referring it to the Master to inquire and report as to the amount of compensation to which the respondents will be entitled by the conversion of their estate in the reversion to an estate in the fee-farm rent. The order in other respects will be in the usual form.

The following order was made:—

It is ordered and declared that the petitioner is entitled,

- (a) 7 Cl. & Fin. 71. (b) See Story on Equity Jurisdiction, s. 1364, note 3.  
(c) 2 M'N. & G. 292.

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Rolls.  
Ex parte  
KNOX.  
Judgment.

1854.

*Rolls.**Es parte*

KNOX.

*Judgment.*

under the provisions of the Renewable Leasehold Conversion Act, to a fee-farm grant from the respondents (the Irish Society), of the messuage, lands and tenements demised by the lease of the 29th of September 1830, in the petition mentioned; and it is further ordered that it be, and it is hereby, referred to the Master in rotation, to inquire and report the amount of compensation to which the respondents are entitled under the 5th section of the said Act, for the loss which will take place in the marketable value of the said respondents' estate and interest in the said messuage, lands and tenements, by the conversion of his estate in the reversion therein into an estate in a fee-farm rent; and it is hereby further referred to the Master to inquire and report (in case the petitioner and respondents shall differ about the same) the amount of the fee-farm rent to be made payable by such grant; and whether any fine or fines, or interest thereon, or fees, are payable by the petitioner to the respondents, before the execution of the said grant in fee-farm; and whether any and what arrear of the rent reserved by the said lease is due by the petitioner to the respondents; and let the Master settle and approve of the draft of the said grant, if the petitioner and respondents shall differ about the same: and the Court doth reserve further order and the question of costs.

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1852.  
*Chancery.*

MURPHY v. MURPHY.

(*Chancery.*)

April 16, 17,  
19.

By indenture bearing date the 8rd of November 1840, and made between William Murphy the elder of the first part, William Murphy the younger, his second son, of the second part, Mathew O'Connor of the third part, Margaret O'Connor, daughter of the said Mathew O'Connor, of the fourth part, Denis O'Connor and James Murphy of the fifth part, and Arthur O'Connor and Charles James Murphy of the sixth part, being the settlement executed previously to, and in contemplation of the marriage then intended, and shortly afterwards solemnized between the said William Murphy the younger and the said Margaret O'Connor, William Murphy the elder conveyed the lands of Kilbrew and other lands in the county of Meath, of which he was seised in fee, to the said Denis O'Connor and James Murphy, and their heirs, to the use of William Murphy the elder, and his heirs, until the solemnization of the said intended marriage, and from and after the solemnization thereof, to the use of William Murphy the younger for life, and after his death to the use that Margaret O'Connor, if she should survive him, and there should be issue of the marriage then living, should receive a jointure of £300 per annum during her life, and subject thereto to the use of the said Arthur O'Connor and Charles James Murphy, for the term of 500 years,

A sum of £8000 was charged on lands of K. by a marriage settlement, as portions for children, to be shared or divided between them in such parts or proportions, and to vest and be paid to such children respectively at and upon such age, days, or times, and to be subject to such charges, provisos, and limitations, such charges or limitations being for the benefit of some or one of them, and in such manner as W. M. the younger by any deed or deeds, instrument or instruments in writing, or by his last will should

direct or appoint, and in default of appointment to be equally divided between or among such children, share and share alike, the shares of sons to be paid at twenty-one, and the shares of daughters at twenty-one or marriage. W. M. by his will bequeathed a legacy of £2000 to his wife, and the interest of the remainder of the money of which he might die possessed, for her own use and for the maintenance and education of his two daughters, and he charged his estate of K., as he was entitled to do by his marriage settlement, with £8000, which together with the residue of his fortune he wished to be divided in equal shares between his two daughters, and he left the residue of his fortune in money, after paying the £2000 to his wife, together with the sum of £8000 charged upon the estate of K., to be equally divided between them; the entire to belong to either of his daughters, should the other not arrive at the age of eighteen years.—*Held*, that the will operated as an execution of the power under the settlement, and that the portions of the daughters vested at the testator's death, and bore interest from that date.

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*Chancery.*  
MURPHY  
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upon the trusts thereafter declared; and subject thereto to the use of all or such one or more of the sons of said intended marriage; and in case there should be no son of said marriage who should live to attain twenty-one years, then after the decease of said William Murphy the younger, and such decease or failure of the sons of said marriage, to the use of William Murphy the elder, his heirs and assigns. And it was thereby declared that the term of 500 years was limited to Arthur O'Connor and Charles James Murphy, upon trust for securing the due and punctual payment of the said jointure thereby provided for the said Margaret Murphy, and upon further trust that, in case there should be any child or children of the intended marriage other than a son or sons who, under the preceding limitations or under the execution of any power therein contained, should be entitled to the said lands or any part thereof exceeding one-third in possession, or one-half in reversion, then the said Arthur O'Connor and Charles James Murphy should by sale or mortgage of said term, or the other ways therein mentioned, "levy or raise the sum or sums of money hereinafter mentioned, for the portion or portions of such child or children (that is to say), if there shall be but one such child, the sum of £6000 of lawful money of Great Britain and Ireland, as or for his or her portion, and to be paid or payable to, and to become vested in such child at or upon such age, day, or time, as the said William Murphy the younger by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or by any codicil or codicils thereto, to be by him signed and published in the presence of and attested by two or more credible witnesses, shall from time to time direct or appoint; and in default of such direction or appointment, to be paid to such child, being a son, at the age of twenty-one years, or being a daughter, at the age of twenty-one years or day of marriage, whichever shall first happen, if the same age or time shall happen after the decease of the said William Murphy the younger; and if the same shall happen in the lifetime of the said William Murphy the younger, then the portion of such child shall

be considered as a vested interest in him or her at or upon the same age, day, or time, but the payment thereof shall be postponed until the decease of the said William Murphy the younger," unless he should sign a consent that it should be raised in his lifetime; "and if there shall be two or more such children other than or not being a son or sons, so for the time being entitled as aforesaid, then the sum of £8000 of the like lawful money for their portions, the said sum of £8000 intended for the portions of such children, being more than one, to be shared or divided between them in such parts or proportions, and to vest and be paid to such children respectively, at or upon such age, days, or times, and to be subject to such charges, provisoes and limitations, such charges or limitations being for the benefit of some or one of them, and in such manner as the said William Murphy the younger, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or by a codicil or codicils thereto, to be by him signed and published in the presence of and attested by two or more credible witnesses, shall from time to time direct or appoint, and in default of such direction and appointment to be equally divided between or among such children, share and share alike; the share or shares of such of the said children as shall be a son or sons to be paid to him or them at his or their age or respective ages of twenty-one years, and the share or shares of such of them as shall be a daughter or daughters, at her or their age or respective ages of twenty-one years, or day or respective days of marriage, which shall first happen, in case the same shall happen after the decease of the said William Murphy the younger," &c. The settlement further provided that it should be lawful for the trustees of the term of 500 years, "at any time or times after the decease of the said William Murphy the younger, with and out of the rents, issues and profits of the said towns, lands, &c., comprised in the said term of 500 years, or intended so to be, with their appurtenances, to levy and raise, pay and apply for the maintenance and education of the child or children for the time being of the said William Murphy the younger, by

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the said Margaret O'Connor, for whom a portion or portions were thereby intended to be provided as aforesaid, in the meantime, and until his, her, or their portion or respective portions shall become payable, such yearly sum or sums of money as they or he shall think proper, not exceeding in any one year for any one such child what the interest, at the rate of £5 sterling for every £100 by the year, of his or her then presumptive portions, under the trusts of the said term of 500 years, would amount to."

The marriage was solemnised, and there was issue two daughters, Margaret Louisa Mary and Catherine Emily Murphy, the plaintiffs. William Murphy the younger died on the 18th of May 1843, leaving the plaintiffs surviving him, and having duly made his will, bearing date the 8th of April 1843, of which the following are the material parts :—

"I bequeath and leave to my dear wife Margaret the sum of £2000 for her own sole use and benefit, to be paid to her upon her demanding it, by my executors, hereinafter named. I leave and bequeath to my own dear wife Margaret the interest of the remainder of the money of which I may die possessed, for her own use, and for the maintenance and education of our daughter Margaret Louisa, and for the maintenance and education of the child which my own dear wife now carries, should that child be a daughter. The management and disposal of the interest of the residue of my fortune in money (after having paid my own dear wife £2000 as above ordered) for the maintenance and education of my one or two daughters, as the case may be, and for the use of my said dear wife Margaret, I leave subject to the control of my dear wife and of both my executors hereinafter named, so that each one of them shall have an equal power and authority in awarding for the benefit, maintenance and education of my daughters (should there be more daughters than one), and for the use of my dear wife Margaret, the disposal of the interest annually receivable upon said residue. I desire that my daughter or daughters (as the case may be) shall receive the best education that can be procured for them. If the child which my dear wife now bears should be a son, I declare him under my marriage settlement entitled to my estate of Kilbrew, in the county

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of Meath, in Ireland; and I desire that the expenses of his maintenance and education be paid from out of the rents and profits of my said estate, and not from out of the money of which I may die possessed. Should the child which my wife now bears be a daughter, I charge my estate of Kilbrew, in the county of Meath, in Ireland, as entitled so to do by my marriage settlement, with a sum of £8000, English sterling money, which, together with the residue of my fortune, after paying to my own dear wife £2000, as before desired, I wish to be divided in equal shares between my two daughters. Should the child which my wife now bears be a son, I will and bequeath to my daughter Margaret Louisa the entire residue of my fortune, after paying to my dear wife Margaret £2000 as above desired; and I hereby charge the lands of Kilbrew with an additional sum of as much as may be required, be the same £4000 or thereabouts, to leave to my said daughter Margaret Louisa the fortune of £10,000. Should the child which my wife now bears be a son, and live to the age of twenty-one years, and be married, I hereby indemnify and declare entirely freed the estate of Kilbrew from any charge for younger children, except that I charge it with so much as may be required to make up, with the residue of my fortune (after paying my own dear wife £2000 as aforesaid), the sum of £10,000 as a fortune for my daughter Margaret Louisa Mary Murphy. Should the child which my wife now bears be a daughter, I leave the residue of my fortune in money, after paying to my own dear wife as aforesaid the sum of £2000, together with the sum of £8000 chargeable upon the estate of Kilbrew, in the county of Meath, to be equally divided between my two daughters, the entire to belong to either of my daughters, should the other not arrive at the age of eighteen years."

The plaintiff Catherine Emily was the child referred to in the will, as the child whom the testator's wife was then carrying. She was born shortly after the date of the will.

After the death of William Murphy the younger, without male issue, William Murphy the elder became entitled to the lands, under the provisions of the settlement, subject to the sum of £8000 charged on the lands in favour of the plaintiffs, and entered into

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possession. The plaintiffs were made wards of Court. Doubts having been entertained, whether the plaintiffs were entitled to be paid the interest on the sum of £8000, in the interval between the death of the testator and the time of payment of the principal, the original bill in this cause was filed, in pursuance of a report of the Master in the minor matter. It prayed that the rights of the plaintiffs might be ascertained and declared, and the trusts of the settlement carried into execution; and that in particular it might be declared that the plaintiffs were entitled to be paid interest at the rate of £5 per cent. per annum upon the said sum of £8000, provided for them as aforesaid, from the death of William Murphy the younger, until the principal sum should become payable, and that William Murphy the elder might be directed to pay the amount of such interest to the guardian of the plaintiffs, for their use and benefit; or, that it might be declared that the plaintiffs were entitled to have an adequate allowance for their maintenance and education, from the time of the death of their father until they should respectively attain the age of twenty-one years, or be married, raised out of the rents and profits of the settled lands, without reference to the income of their other property. The cause was heard on bill and answer on the 3rd of June 1849, when it was directed to stand over, with liberty to the plaintiffs to amend the bill, so as to bring before the Court all questions in which they were interested, as well as regarded the charges under the said settlement, as the will of their father.

William Murphy the elder having died on the 2nd of September 1849, a bill of revivor and supplement was filed, bringing before the Court the parties claiming under his will, and praying, in addition to the relief prayed by the original bill, that the plaintiffs might be declared entitled to the benefit of a provision made for them by the will of William Murphy the elder, by which he devised to them two annuities of £100 each out of the lands of Kilbrew.

The answer of the principal defendants submitted that, having regard to the nature and effect of the will of William Murphy the younger, and also of the will of William Murphy the elder, and the provisions thereby respectively made for the benefit of the plaintiffs,

and upon the true construction of the settlement of the 4th of November 1840, the plaintiffs were not entitled to be paid interest on their respective portions of the sum of £8000 until the principal should become payable.

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—  
*Argument.*

Mr. *Brewster*, Mr. *Deasy* and Mr. *Lefroy*, for the plaintiffs, argued first, that the provision made by the will of W. Murphy the younger was intended to take effect immediately on the testator's death, and operated as an execution of the power given him by the settlement. This was evident from the clauses of the will which gave the plaintiff the benefit of survivorship, and from the residuary clause which was to take effect immediately, and was coupled with the appointment of the £8000 charged by the settlement, showing that both were intended to take effect at the same time. Secondly, that the plaintiffs were at all events entitled to maintenance under the settlement. They cited 1 *Sug. on Powers*, p. 145; *Rawlins v. Goldfrap* (a); *Wilson v. Piggott* (b); *Foljambe v. Willoughby* (c); *Bruin v. Knott* (d); *Lygon v. Lord Coventry* (e).

Mr. Serjeant *Christian*, Mr. *F. Fitzgerald* and Mr. *Berkeley*, for the defendants, contended that the will merely appointed the principal sum, but was silent as to the interest, in respect of which there was no appointment, either in terms or to be collected from the intention of the testator, as apparent on the will. Secondly, they contended that the provisions in the settlement as to maintenance were not intended to be resorted to in any event; and, considering the provision made by the will of William Murphy the elder, it ought not to be resorted to by the trustees. They cited *Lord Pawlet's case* (f); *Warr v. Warr* (g); *Hinchinbroke v. Seymour* (h); *Duke of Chandos v. Talbot* (i); *Prowse v. Abing-*

(a) 5 Ves. 440.

(c) 2 Sim. & St. 167.

(e) 14 Sim. 41.

(g) Pr. in Ch. 213.

(b) 2 Ves. jun. 351.

(d) 1 Phil. 572.

(f) 2 Vent. 368.

(h) 1 Br. C. C., 391, 395.

(i) 2 P. Wms. 601.

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*don (a); Forth v. Chapman (b); Browne v. Paull (c); Berkeley v. Swinburne (d).*

Mr. W. Armstrong, for the trustees of the term of 500 years.

The LORD CHANCELLOR.\*

April 19.  
 Judgment.

It cannot be doubted that, in this case, the testator intended to execute the power reserved to him by the settlement, nor, that if the devise of the sum of £8000, though to be paid out of land, were to be construed without reference to the power, it would take effect, and vest in each of the daughters of the testator £4000, immediately on his death. The only question is, whether the clauses of the will which operate as an execution of the power do more than appoint the shares of the daughters, leaving the times of vesting as they were prescribed by the settlement in default of appointment—that is, at the age or ages of twenty-one, or day or days of marriage.

It is contended by the plaintiff that, there being no time or event to which the will postpones the payment, and the gift being by words which *per se* indicate that it is to operate *in presenti*, it must take effect at the time when, unless a contrary intention be indicated, the will itself is by law to take effect, that is, on the testator's death. In aid of this argument, it is further said (and I think rightly) that the bequest of the residue, whatever be its trusts, is undoubtedly immediate, and that being coupled with the appointment of the £8000, and both being given in the same terms, the intention of the testator is evident that both should take effect at the same time.

Though it is indisputably true that the same words in a will may, in certain cases well recognised and established, have a different operation according to the different subjects to which they relate, yet the plain rule of construction in general is, to give them the same signification and effect. I do not find any case contravening

(a) 1 Atk. 482.

(b) 1 P. Wms. 663.

(c) 1 Sim., N. C., 92.

(d) 6 Sim. 613.

\* The Right Hon. F. BLACKBURNE.

this rule, when the same clause in the will operates both as a bequest and an execution of a power.

But I entirely admit that, if the will intimates an intention to execute the power, and to do so only to a certain extent, the provisions of the settlement are of necessity to be referred to, and should govern the rights of the parties, as far as the will is silent and inoperative.

In the present case, however, if the construction we give the clauses in question is that contended for by the plaintiff (which I think it is), the whole power is exercised, the time of payment and vesting being that of the testator's death. Besides the reasons which I have adverted to as sustaining this view of the case, there is the further and most important, indeed to my mind conclusive, argument against referring to the times or events specified in the settlement as those on which the appointments were to take effect. I allude to the words of the second clause, which, after directing the £8000 to be equally divided between the two daughters, says, "the entire to belong to either of my daughters, should the other not arrive at the age of eighteen years." The meaning of this admits of no doubt. It gives to each daughter a contingent interest in the share of the other, showing a clear intention that, before eighteen years of age, he meant that each should have a right to her moiety—that that right should be divested in favour of the other, if she died before eighteen, and that at eighteen the survivor should have the whole.

These dispositions are all warranted by the power, are perfectly valid, regulate the rights of the children, and make it utterly impossible for a Court to refer to, or adopt, the times or words of payment specified in the will. The repugnancy to which such an adoption would lead is so obvious, that we could not give effect to the provisions of the settlement, which provide for the case of the non-execution of the power, without subverting the appointment made by the will, which we are obliged to support and effectuate.

Declare that, under and by virtue of the indenture of the 3rd of November 1840, in the pleadings mentioned, and the will of William Murphy, jun., the plaintiffs are entitled equally to the principal sum of £8000, by the said indenture provi-

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MURPHY.  
*Judgment.*



The defendant moved at the Rolls, on objections to vary the Master's report; and on the 1st of March 1852, his Honor directed the motion to stand over, in order to enable the plaintiff and defendant to make affidavits, if so advised. Two affidavits were accordingly made on the 3rd and 5th of March—the one by the plaintiff and the other by the defendant's solicitor. The affidavits being contradictory of each other, as to the timber being ornamental, the Master of the Rolls, by an order of the 19th of April 1852, directed that the report should be sent back to the Master, and that he should be at liberty to re-consider his report on the evidence stated in the schedule to his report, and also upon the affidavits of the plaintiff, filed on the 3rd of March 1852, and of the defendant, filed the 5th of March 1852, and that the Master, if he should so think fit, should receive additional evidence.

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Statement.

The plaintiff now moved, by way of appeal, to vary the orders of the 1st of March and the 19th of April, and that the Master's report might be confirmed. The evidence on which the report and orders were founded is sufficiently stated in the LORD CHANCELLOR's judgment.

Mr. Serjeant *Christian* and Mr. *Warren*, for the appeal, contended that the admission of further affidavits on a motion to vary the Master's report was irregular and contrary to practice; and in support of the report they cited *Magennis v. Fallon (a)*; *Davis v. Davis (b)*; *Flight v. Booth (c)*.

Argument.

Mr. *F. A. Fitzgerald* and Mr. *Hamilton Smythe*, in support of the orders, and against the report, relied on *Whitworth v. Whyddon (d)*; *Peel v. Hague (e)*; *Sug. Ven. p. 34*; *Dobell v. Hutchinson (f)*; *Dykes v. Blake (g)*.

(a) 2 Moll. 561.

(b) 2 Atk. 21.

(c) 1 Bing. N. C. 370.

(d) 2 M'N. & G. 52.

(e) 16 Sim. 315.

(f) 3 Ad. & El. 355.

(g) 6 Scott, 320.

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 HAM.  
 May 13.  
*Judgment.*

The LORD CHANCELLOR.\*

In this case, the plaintiff appeals from two orders made by his Honor the Master of the Rolls; one made on the 1st of March, and the other on the 19th April, 1852. It is not necessary however to advert to any of the proceedings previous to the order of the 17th of April 1851, whereby it was referred to Master Brooke to inquire and report whether the title to the timber of certain lots, Nos. 21 and 2 of the Tyrcallen estate, contracted to be sold by the plaintiff to the defendant, are material to the possession and enjoyment of the said estate; and if he should find that it was not, then to report the amount of the compensation to which the defendant was entitled in consequence of the failure of the plaintiff to make out title to it. The Master, on the 29th of January 1852, reported that the [timber on those lots was not material to the possession and enjoyment of the estate, and found the compensation for the timber to be £95. 14s. for one lot, and £25. 10s. 6d. for the other. This report the defendant moved to set aside, on the general ground that the Master should have reported that the timber was material to the possession and enjoyment of the estate. The order of the 1st of March was that the motion should stand over, in order to enable the plaintiff and defendant to make affidavits, if so advised. Under this permission two affidavits were made, one by the defendant and the other on the part of the plaintiff; and the motion afterwards coming on on the 19th of April, it was ordered that the report should be sent back to the Master, with liberty to him to reconsider it, on the evidence in the schedule to his report, and on the two affidavits; and the Master was to be at liberty, if he thought fit, to receive additional evidence. I understand his Honor not to have expressed any dissent from the finding of the Master, but rather to have said that in the evidence he did not think there was sufficient matter to warrant a satisfactory conclusion one way or the other. It is however insisted by the plaintiff in this appeal, that there was such evidence, and that the report should not have been sent back to be reconsidered.

The order of the 1st of March is objected to, on the ground that it was contrary to the practice of the Court to allow further

\* The Right Hon. FRANCIS BLACKBURNE.

affidavits to be made; this however is hardly to be regarded as matter of appeal, as the appellant availed himself of it by having a further affidavit made.

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The question then for my determination is whether the report was warranted by the evidence; and here we must keep in mind the very peculiar character of the inquiry. The question whether timber be essential to the enjoyment of the estate, because it is ornamental, is one partly of fact and partly of opinion and taste, the object and end of the inquiry being to ascertain whether, though in respect of its intrinsic value it may admit of pecuniary compensation, its adventitious value as an ornament to the estate be not so material and substantial as that it may be reasonably supposed that, without a right to it, the purchaser would not have entered into the contract at all.\* There is not, I may observe, any difference, indeed there could be none, as to the principal facts respecting this timber. It grows on two portions of the estate remote from each other: the ground occupied by it is a few acres, very limited in extent, when compared with the extensive woods which cover above 200 acres. Neither of those small parcels are within the demesne, but they are separated from it by the holdings of different tenants, and are not in view of the mansion-house, pleasure grounds, avenues or approaches. The greater part of the larger parcel is situate on a low level, and from the undulation of the ground between it and the public road, from a limited part of which it is visible, and from the growth of timber planted by Mr. H. Stewart on his own intervening estate, even this partial view may soon be shut out. The timber on the smaller parcel was planted by the tenant, is in the worst condition, planted in detached rows, and is only visible from a part of the public road. One of the parcels (the larger) lies in part in undulating ground, and its removal, it is stated, would be injurious to the appearance and effect of the adjacent plantation.

Having given an outline of the facts, I come to consider the opinions of the different persons who have made affidavits; and it is quite enough to say of them, that they are utterly at variance. I do not, however, hesitate to say that the views and opinions of those

\* See 1 Bing. N. C. 377.

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 —  
*Judgment.*

who think this timber not essential to the enjoyment of the estate are borne out and sustained by all that is stated as to the position, extent and quality of this timber, and, if well founded, fully warrant the conclusion at which Master Brooke arrived. I am further of opinion that nothing is disclosed, either by the affidavits before the Master or by the supplemental affidavits, to warrant me in thinking that evidence can be obtained more satisfactory than that which the parties have already adduced and relied on; and without any reason to think that any further disclosure of facts is likely, I think it important not to re-open an inquiry on a subject admitting of such different and irreconcilable views.

I am very much confirmed in this opinion by the course which the proceedings have taken, and the conduct of the defendant. I observe that his Honor, in his very able judgment, delivered on the 16th April 1851, in page 374, says: "It has not been alleged that the timber on the 24 acres is to be considered ornamental timber, nor is it alleged that the right to it is material to the possession or enjoyment of the estate." This remark is fully supported by a reference to the matter of the fifth and sixth exceptions, which complain of the defect solely on the ground of the quantity and value of the timber. This seems to me of importance, both as it affects the expediency of furnishing any further evidence, and as it affords some test for trying which of the conflicting allegations is the more probable. Indeed it may be fairly asked, if this timber was of such indispensable importance to the enjoyment of the estate as it is now said to be, why was it forgotten in the former reference; and why was the evidence exclusively confined to the value and quantity of the timber? I cannot divest my mind of the impressions which the obvious answers to these questions are calculated to create; and when I find that Master Brooke has adopted a conclusion which the evidence appears to me to justify, I am altogether indisposed to encourage or allow any further affidavits, keeping in mind these important considerations, that the order appealed from does not adopt the objections to the report, and that there are not any specific grounds alleged for further inquiry or evidence.

For these reasons, I affirm the order of the 1st of March, and

vary that of the 19th of April, and overrule the fifth and sixth exceptions; the effect of which is, that the report of Master Brooke stands confirmed.

[A decree for specific performance was subsequently made in the cause.]

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HAM.  
*Judgment.*

WOOD v. KNOX.

April 30.  
May 1, 3.

LOFTUS JONES, being seised in fee of the lands of East and West Montagh, by lease, bearing date the 29th of April 1780, in consideration of £1000, demised them to James Wood the first, his heirs and assigns, for three lives, at a rent of £100, with a covenant for perpetual renewal, in the following form:—"That on the death of any of the lives therein-before mentioned, the said James Wood, his heirs and assigns, first paying, or causing to be paid, unto the said Loftus Jones, his heirs and assigns, the sum of £11. 7s. 6d., by way of fine, over and above all rent and arrears of rent then due on the said demised premises, and on the nomination of the life of any other person to be put and inserted in the place and stead of the person so happening first to die as aforesaid,—the said Loftus Jones, his heirs and assigns, should and would, within twelve calendar months from the death of such person so happening first to die as aforesaid, add and insert to the time and term of the said lease the life of such person so nomi-

No form of words is necessary to constitute the delivery of an instrument as an escrow. If the real intention of the parties be that the instrument shall not operate at all except and until a specified condition be performed, it is an escrow.

Therefore, where the renewal of a lease was executed by the lessors on the promise and faith of immediate payment of the renewal *Held*, that the

finer, and there was no attesting witness to the execution, it was the renewal was delivered as an escrow.

The interest in a lease for lives renewable for ever was settled on A for life, remainder, subject to a jointure to A's wife, to the use of his children, who were minors. In 1839, one of the lives being dead, a negotiation for a renewal took place between A and B, one of six parties entitled to the reversion, acting on behalf of all. In 1847, a renewal was executed as an escrow by the reversioners, on the promise, which was not fulfilled, of immediate payment of the fine. In July 1849, a demand in writing of the renewal fines was made by B, on behalf of himself and the other parties interested, on A. In March 1851, another *cestui que vie* having died in the meantime, A tendered the amount of the renewal fines.

*Held*, that the right to a renewal had been forfeited, and a petition for that purpose was accordingly dismissed, with costs.

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*Statement.*

nated, instead of the person so happening first to die as aforesaid; which life, so to be added and inserted, was to be indorsed on said lease, or written on a deed, label or parchment, to be affixed to said lease for that purpose, or in a separate deed or writing, declaring the last life or lives so failing, and the life or lives added in lieu thereof, and the three lives in being during which the said estate should be then to continue; and in like manner for ever successively upon the failure of every several life in said lease then nominated, or thereafter to be successively nominated as aforesaid, and on the like payment of the said sum of £11. 7s. 6d., of lawful money of Great Britain, over and above all arrears of rent that should be due on the said demised premises; and on the like nomination of every other successively, in lieu of every such several life nominated as aforesaid, the said Loftus Jones, his heirs and assigns, should and would, within twelve calendar months of the failure of every such several life nominated as aforesaid, add and insert to the time and term of the said demise, for ever, the several life and lives of such person or persons, to be nominated instead of the life and lives, to be added and inserted successively, happening to die as aforesaid; which several lives to be added and inserted successively were to be indorsed on said lease, or written in deeds, labels or parchments, to be affixed thereunto, or on separate deeds or writings as aforesaid."

On the 28th of June 1817, the reversion being vested in John Knox and Annesley Gore Knox, and the interest of the lessee in James Wood the third, a renewal was executed by the Messrs. Knox to Michael Fenton as trustee for James Wood the third, for the lives of James Wood the third, and his brothers W. C. Wood and Abraham Wood.

On the 26th of September 1833, the interest under the lease was settled, on the marriage of James Wood the third, to the use of James Wood the third for life, remainder to his first and other sons in tail, remainder to the right heirs of James Wood the third, with power to him to charge a jointure for any after-taken wife, and portions for younger children. There was issue of the marriage one son, Gregory Wood, a minor.

James Wood the third married again in 1842, and, by a deed of

the 7th of November 1842, executed his power of jointuring, and charging portions for the children of the second marriage. There was issue of the second marriage, James E. N. Wood, a minor.

Abraham Wood and W. C. Wood, two of the lives named in the renewal of 1817, died—the former on the 25th of July 1833, and the latter on the 2nd of January 1850.

The reversion became vested, on the death of Annesley Gore Knox, in his five children—St. George Knox, John Knox, James Annesley Knox, Henry Knox and Francis Knox, and John Knox, one of the lessors of the renewal of 1817.

In 1839, a correspondence took place between James Wood the third and James Annesley Knox, with respect to a renewal, and in 1840 a draft renewal was prepared. The solicitor for the lessors raised objections in the progress of the negociation, and the draft was not approved of. In 1847, another draft renewal was furnished by James Wood the third to the attorney of the lessors, which was returned with various amendments, and a letter claiming £31. 10s. 0d. for renewal fines. The draft as amended was engrossed, and executed by James Wood the third, and transmitted to George H. Jackson, the attorney of the lessors, with a statement to the effect that when the said renewal was executed by the lessors, the fines would at once be paid in exchange for the tenants' part of the said renewal. The deed was executed by the lessors under the circumstances hereinafter mentioned, but no reply was made until the 23rd of July 1849, when the following letter was written:—

“SIR—On my own behalf, and on that of my brothers, who are equally interested with me in the lands of Montagh, I beg leave to call your attention to the fact of one of the lives in the last renewal being dead for a length of time, and consequently of there being a large sum due to us for renewal fines and interest; which sum, as I do not understand the principle on which these fines are calculated, I request you will forthwith pay to our solicitor, Mr. George H. Jackson, of 19 Upper Mount-street. I must add, that unless this sum is paid within a reasonable time, we will refuse to renew the lease.—I am, Sir, your obedient servant,

“ST. GEO. KNOX.”

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No other application for the renewal fines was made, by or on behalf of the five other persons interested in the reversion of the lands.

On the 9th of August 1849, the attorney of James Wood wrote to Mr. Jackson on the subject of the renewal fines. On the 20th of August 1849, the latter replied, inclosing an account of the renewal fines, as he calculated them, which account the petition stated was incorrect and excessive. No further communication took place between the parties until the 14th of March 1851, when James Wood caused a calculation of the renewal fines, which amounted to £63. 9s. 3d., and that sum and the rent due to be tendered to the land agent of the lessors, to Mr. Jackson, and to the parties interested in the reversion, who refused to accept it.

The petition, which was filed by James Wood, his wife, and minor children, prayed an account of the sums due for rent, renewal fines, septennial fines and interest on foot of the said lease; and that upon payment thereof the indenture of renewal, which had been executed, might be handed over to the petitioners as a valid and effectual deed of renewal, or that the respondents might be decreed to execute a renewal to the petitioners for the lives for that purpose to be nominated, pursuant to the covenant for perpetual renewal contained in the original lease; and that, if necessary, it might be referred to one of the Masters to approve of a proper deed of renewal.

The affidavit of the respondent, St. George Knox, stated that two parts of a deed of renewal were engrossed, and handed to Mr. G. H. Jackson, to be executed by him and the necessary parties; but that at the time of the delivery of the said deed, no sum was tendered to Mr. Jackson, or deponent, or his brother, as a renewal fine; and he submitted that such sum of money as was due for renewal fines should have been paid previous to or at the time of delivery of said deed for execution. That the petitioner had at the time executed the deed, and G. H. Jackson presented the said engrossed deed, and stated to deponent and the other granting parties named therein, that the renewal fine would be at once paid, and that they might sign the said deed; and that they, relying on such statement, and that the money would be immediately paid,

did sign said engrossed deed, and that such signing was done for the sake of convenience, and under the belief of immediate payment of said renewal fines, and that it was then and at the time of the signing of said deed agreed and understood by and between the deponent and said granting parties, that unless said fines were paid within a few days, the said deed was not to be considered as binding on the parties; and that he had been informed and believed that the said G. H. Jackson did acquaint the said solicitor for said petitioner, of the said signing of said deed of lease by the said granting parties, and required to be paid the renewal fines as promised.

The affidavit further stated that George Knox, as he considered the deed to be null and void, and of no force and effect, caused the notice of the 23rd of July 1849 to be served on James Wood, and he relied on the fact of the petitioner having calculated renewal fines from the death of Abraham Wood to March 1851, as evidence to show that it was the distinct understanding between G. H. Jackson and the solicitor for the petitioner, and the petitioner himself, that the deed was to be of no force or effect unless the fines were paid.

An affidavit was made by G. H. Jackson, in which he stated that a draft lease was sent to him as solicitor for the respondents, by Mr. Moffett, solicitor for the petitioner James Wood the third, for the renewal of the original lease, which was returned by him amended, and which he agreed to, if the renewal fines were paid. That the deeds were returned for the purpose of having the same signed by the granting parties, without the renewal fines. That he required Moffett to pay the fines before he would take the engrossed deeds, but Moffett stated to him that the amount would be paid immediately, and requested him not to cause any further delay, and that, as he was going to the country where the granting parties resided, and Moffett wished to have the deeds executed, he stated to the granting parties the promise of Moffett, and requested them to sign same, and that the money would be paid when all the granting parties had signed. That they signed on the faith of immediate payment, and that, as he best recollected, he shortly afterwards informed Moffett thereof, and asked for payment of the

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finer. He further stated that the engrossment of the lease, so signed by the respondents in 1847, was not delivered to him to be handed over at any time that the renewal fines mentioned therein would be paid, but on the contrary, such payment was to be made immediately, as was promised by those acting for James Wood the third.

*Argument.*

Mr. Serjeant *Christian*, Mr. *F. Fitzgerald* and Mr. *P. Blake*, for the petitioners, argued that the petitioners were entitled to have the renewal handed over to them, as the legal estate passed by the renewal. That no sufficient demand of the fines had been made, to create a forfeiture under the Tenantry Act, St. George Knox having no authority from the other parties interested in the reversion, to make a demand, the letter of July 1849 not being addressed to all the parties entitled to the interest under the lease, there being no advertisement in the *Gazette*, as required by the Act, and the fines having been calculated on an erroneous principle. That even supposing the demand to have been sufficient, the delay in payment was not such as to amount to gross neglect within the authorities: *Sheph. Touchstone*, p. 49; *Buller v. Lord Portarlington* (a); *Forster v. Lord Massarene* (b); *In re Colthursta, Minors* (c); *Baldwin v. Bridges* (d).

Mr. *Brewster*, Mr. *Martley* and Mr. *Atkinson*, for the respondents, argued that the renewal had been delivered as an escrow, conditionally on the immediate payment of the fines: *Johnson v. Baker* (e); *Nash v. Flynn* (f). That the demand was sufficient to bring the case within the Tenantry Act, and the conduct of James Wood the third, who must be taken to have represented all the parties entitled to the tenants' interest, amounted to such wilful and obstinate refusal and neglect, that the petitioners

(a) 1 Dr. & War. 20; S. C. 4 Ir. Eq. Rep. 1.

(b) Lyne's App. 12.

(c) 3 Dr. & War. 35; S. C. Fl. & Kel. 515.

(d) Ll. & G. temp. Plun. 416.

(e) 4 B. & Ald. 440.

(f) 1 Jo. & Lat. 162; S. C. 6 Ir. Eq. Rep. 565.

had disentitled themselves to the relief sought by the petition. They cited *Townley v. Bond* (a); *Barrett v. Burke* (b); *Jackson v. Sanders* (c); *Mountmorris v. White* (d); *Bushell v. Passimore* (e).

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The petition in this case is filed to have an account of the sums due by the petitioner for renewal fines, &c., and interest; and it prays that on payment of the sum to be found due, a certain deed of renewal of a lease of the 29th of April 1780 may be handed over to the petitioners; or, that the respondents may execute a renewal, to be settled by the Master.

May 3.  
*Judgment.*

The lease, which contains the covenant for renewal, was made by Loftus Jones to James Wood, in consideration of £1000, at a rent of £100, and was renewable on payment of a fine of ten guineas. The interest of the lessee vested in the plaintiffs, some of whom are minors; and the defendants, who are five in number, are the owners of the fee. A renewal was executed in 1817, to Michael Fenton in trust for James Wood. A. Wood, a *cestui que vie*, died on the 25th of July 1833; and W. C. Wood, another *cestui que vie*, on the 2nd of January 1850. The death of James Wood was known to all the parties in 1839, if not sooner; and the plaintiff James Wood, who then acted on behalf of all the persons interested in obtaining a renewal, and who, with his wife and infant sons, are petitioners, addressed a letter to James Annesley Knox, who was then acting for himself and the other reversioners. This led to a protracted negotiation for a renewal, and to the actual preparation of a draft, but all proved abortive; and as far as regards the present suit, the only result was to fix James Wood, who so acted for all the parties in the same interest, with clear notice of every fact necessary for his and their guidance in all that concerned their rights and obligations. That a fine was due, and that its payment was or could be insisted on as the condition of the renewal

(a) 4 Dr. & War. 240.

(b) 5 Dow. 17.

(c) 2 Dow. 437.

(d) 2 Dow. 460.

(e) 6 Mod. 207.

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which they required, is thus unequivocally brought home to the knowledge of the parties at this comparatively early period.

An interval of nearly seven years of total inactivity succeeds, and then, in 1847, the same James Wood renews the negotiation; the fines and interest are calculated, and found to amount to £31. 10s. Od., and a draft of a renewal is prepared by Mr. Moffett on the part of James Wood—is approved of by Mr. Jackson on behalf of the reversioners, and engrossed by Mr. Moffett. We are now to decide on the evidence, whether this renewal was delivered generally, or as an escrow? This involves the necessity of examining all the facts, from which the real nature of the act done may be ascertained.

No two things are more distinct than the delivery of a deed, and its subsequent deposit, to abide some future event, and the delivery of the deed to be delivered a second time, and to take effect when and if such an event shall occur. The possibility of confounding them, may, it is true, be avoided by the observance in the latter case of the only forms of expression which are set forth in *Shepherd's Touchstone* and other books; but these are not absolutely necessary, nor are they the only tests for ascertaining whether the instrument is a deed or an escrow. It is now clearly settled that if the real intention of the parties be that the instrument shall not operate at all, except and until a specified condition be performed, there is no form of words in which that intention need be expressed.

Taking this as the rule, let us see what was done, premising however, that if, as the petitioner contends, the renewal was absolutely delivered, the estate passed by it, and the landlord thereby lost the best, if not the only, means of enforcing payment, viz., his power to refuse a renewal unless the fine was paid. Mr. Jackson was the person on whose advice the respondent acted; and he says he required Moffett to pay the fines before he would take from him the engrossed deed. What was Moffett's reply? That the amount would be paid immediately, and not to cause further delay, as Jackson was going to the country where the granting parties resided. On this Jackson acts, takes the deeds to the country, meets the parties, and repeats the promise of Moffett, and asks them to sign

the deed ; and he says they did so on the faith of immediate payment. This is the testimony of the very person who had received the positive assurance of Moffett ; and it is clear from their answer that his clients acted on it, believing that the money would be paid immediately. The respondent says accordingly, that they, relying on such statement, and that the money would be immediately paid, did sign the engrossed paper ; and that their signing it was done for the sake of convenience, and under the belief of immediate payment : and further, that it was then, and at the time of the signing of said deed, agreed and understood between the granting parties, that unless the fine was paid in a few days, the deed was not to be considered binding on the parties. In corroboration of this, we find that there is no witness to attest the execution of the deed—an omission of great moment, because manifestly the result of the qualified and limited effect which they at the time intended that their act should have.

If this be all true, where is there to be found a trace of the use of any words or formula which is to overbear and defeat an intention as clearly indicated, in my opinion, as words could express it, that the instrument was to confer no right until the preliminary condition was performed ? If there be no proof of the absolute delivery of the instrument (and there is none), we have no right to make any presumption of it ; for to do so would be utterly subversive of the intention of the parties, and of the right which they meant to retain. The improvidence which we should thereby impute to the respondents would be as gross as the fraud which the other would be enabled to commit.

If we look to the subsequent acts of the parties, as throwing light on this transaction, they leave no room for doubt. In the following Term, Moffett is informed that the deed is executed, and payment is demanded of the fines : he does not pay the fines ; but neither does he venture to claim the deed, and it remained from thenceforward in the possession of the defendants. Having regard to the evidence I have abstracted, I cannot entertain a doubt of the intention of the respondents, or of the real and substantial character of this transaction.

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*Judgment.*

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*Judgment.*

In support of the view which I have taken of this part of the case, I refer to the case of *Johnson v. Baker* (a); its facts would seem sufficient to warrant the argument, that words importing the absolute delivery of a deed could not be controlled by declarations of intention; but the Court decided otherwise. The defendant, sued in covenant, pleaded that he delivered the deed as an escrow. It appeared there that there was a meeting of creditors relative to the execution of a deed of composition, at which it was stated that the deed should be void if all the creditors did not execute it. The plaintiff was not present. The defendant afterwards, at the same meeting, executed the deed in the ordinary way, and without saying any thing at the time of the execution. The deed was delivered to one of the creditors to get it executed by the other parties. On this state of facts, Abbott, C. J., was of opinion that the condition previously expressed, though not introduced into the act of delivery, was sufficient to make this a delivery of the deed as an escrow. The Court held this to be right, and that the conversation which took place immediately before the execution of the deed must be taken as part of the transaction, and that therefore the delivery of the deed was conditional, and not absolute.

Without dwelling on the obvious effect of this as an authority, it establishes a principle which the facts of the present case oblige me to apply to it; and therefore to hold that the deed of renewal was delivered as an escrow. I would also refer to the case of *Nash v. Flynn* (b), as an authority obliging me to come to the same conclusion.

The second question in the case is now to be considered: it is, whether the plaintiffs neglected to pay the fines after a reasonable time from the demand made of them, which was on the 23rd of July 1849. No tender of them was made until March 1851. For this delay, in my opinion, no excuse which the Court can admit is offered: looking to the mere continuance of it, a period of nineteen or twenty months, and to the decisions in *Jackson v. Sanders*, and the other authorities in which the same question has occurred, it is impossible to hold the plaintiffs entitled to the benefit of the statute, the requisition of which they have not complied with.

(a) 4 B. & Ald. 440.

(b) 6 Ir. Eq. Rep. 565.

But if this is the view of the case presented by the mere lapse of time, how powerfully is it confirmed by all the facts which preceded the demand—facts which, though they could not be used as a bar to a renewal, had the demand of the 23rd of July been promptly complied with, are to be taken into account, when we are estimating the degree of diligence which that demand imposed on the tenant. The brief summary of them is, that in 1839 there was full notice that the fine was due ; that the acts of James Wood, who acted for the tenants, held forth an assurance that it would be paid without delay ; that in 1847 the fine and interest were ascertained and agreed on, and the most explicit promise made to pay it, whereby the plaintiffs were induced to do an act, on the validity of which the plaintiffs insisted, and even in this suit insist, though they failed to perform their promise which induced that act, and which, in justice and conscience, they ought themselves to have performed in the year 1847. Taking these various considerations into account, the delay subsequent to July 1847 becomes altogether inexcusable and unjust.

There were three grounds suggested to account for it. One was, that George Annesley was not authorised, by the other persons in the same interest as himself, to make the demand of the 23rd of July 1849 ; but I think he had a clear right to make it, and that it was competent for the other parties, for whom he undertook and professed to act, to adopt and ratify it as they have done. It was next said that the computation of the fines furnished in August 1849 was incorrect. It seems to have been so, but not in consequence of any misrepresentation of any fact on the part of the defendants. It was the result of a common error into which the solicitors for both parties had fallen, in making the calculation, on which the plaintiffs had two years before acted when they promised payment. It would be too much to visit this exclusively on the landlord, when the slightest attention would have led to its immediate correction. Its amount, too, repels the idea of any intention to defraud or suppress the fact. It is then said that the demand was not made on the proper parties. For this there is no pretence. It was made on James Wood,

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the person who, throughout, has acted for all, and of whose acts they claim the benefit in this suit.

I am, on the whole case, of opinion that I must refuse the relief sought, and dismiss the petition with costs.

### MURRAY v. MURRAY.

*May 5.*

Lands were devised by a will to D. and J. for their lives, remainder over, and by a codicil the testator, after revoking the remainders devised the lands after the deaths of D. and J., or either of them, to the use of his nephews W. and H. and all and every the child and children of W., begotten or to be begotten, to be equally divided between them, as tenants in common, and the respective heirs of their bodies, lawfully issuing, with cross remainders between them. W. had two

children who were alive at the death of D. *Held*, that the children of W. who were *in esse* at the death of D. took as tenants in common with W. and H., to the exclusion of any who should afterwards be born.

Where a devise to a class is not immediate, but is postponed to a particular period or to a particular event, those only who answer the description at that period, or on the happening of that event, are entitled to take.

*Crone v. O'Dell* (1 B. & B. 459), approved of.

THE cause petition stated that Hannah Doyle, otherwise Murray, by her will bearing date the 9th of June 1818, and duly executed in pursuance of a power in her marriage settlement, devised and bequeathed certain freehold and leasehold premises to trustees, on the following trusts:—"To the use of my husband Samuel Doyle, and his assigns, for the term of his natural life, and after the decease of the said Samuel Doyle, then to the use and behoof of my said brothers Daniel Murray and John Murray, between them, share and share alike, to take as tenants in common, and not as joint tenants, for the term of their respective lives; and from and after the decease of them or either of them, then as to the share or shares of them or him so dying, to the use and behoof of my nephews William Murray and Hugh Murray, and my said two nieces Hannah Murray and Mary Murray, to be equally divided between them, share and share alike, to take as tenants in common, and not as joint tenants, and of the several and respective heirs of their bodies lawfully issuing. And in case one or more of them should happen to die without issue of his, her or their bodies, then as to the share or shares of him, her or them so dying without

lawful issue, to the use of the survivors or others of them, share and share alike, to take as tenants in common, and not as joint tenants, and of the several and respective heirs of the bodies lawfully issuing of such survivors or others of them; and in case all of such children but one should happen to die without issue, then to the use of such surviving or only child, and of the heirs of his or her body lawfully issuing; and in case all of said children should happen to die under the age of twenty-one years, and unmarried, to the use of my nephews William Murray and Hugh Murray, share and share alike, as tenants in common, and to their heirs, executors, administrators and assigns."

On the 12th of June 1822, the testatrix executed a codicil, wherein, after reciting the foregoing limitations, she proceeded thus :—

"Now I do hereby revoke, annul and make void the said last mentioned limitation, so far only as relates to my said nieces Hannah Murray and Mary Murray, and their heirs. And I do hereby will, direct and declare that my said trustees shall, after the decease of my said brothers Daniel Murray and John Murray, or either of them, stand seised of the share or shares of him or them so dying, to the use and behoof of my said nephews William Murray and Hugh Murray, and all and every child and children of my said nephew William Murray, begotten or to be begotten, to be equally divided between them, share and share alike, and to take as tenants in common, and not as joint tenants, and of the several and respective heirs of their bodies lawfully issuing. And in case one or more of them shall happen to die without issue of his, her or their body or bodies, then as to the share or shares of him, her or them so dying without lawful issue, to the use of the survivors, or others of them, share and share alike, as tenants in common, and not as joint tenants, and of the several and respective heirs of the bodies, lawfully issuing, of such survivors or others of them. And in case all such children but one shall happen to die without issue, then to the use of such surviving or only child, and of the heirs of his or her body, lawfully issuing. And in case all of the said children shall happen to die under the

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age of twenty-one years, and unmarried, then to the use of my nephews William Murray and Hugh Murray, share and share alike, as tenants in common, and to their heirs, executors, administrators and assigns."

The testatrix died in the year 1823; her husband Samuel Doyle, the first tenant for life, died in 1830, whereupon William Murray and Hugh Murray entered into possession of the rents and profits of one moiety of the property. Daniel Murray, who would otherwise have been entitled, having died in the year 1828, these rents they divided equally between them, down to the year 1840, conceiving that, under the limitations of the codicil, they were each entitled to a moiety. In the year 1843, John Murray died, and William Murray and Hugh Murray entered into possession of the whole of the property. William Murray had two children; and in 1840, William Murray and the said children claimed to be entitled each to one-fourth of the property, as tenants in common with Hugh, and thence hitherto Hugh Murray had received but one-fourth of the rents and profits of the premises.

Hugh Murray now filed this petition, by which he prayed that he should be declared entitled to one moiety of the said premises, as tenant for life thereof, under the bequest in the said codicil contained.

It appeared by the petition that several of the premises having been sold, or their leases having expired, the only property now remaining was certain houses in Granby-row, in the city of Dublin, held for a term of 999 years.

It was stated in the answering affidavit of the respondents, that at the date of the testatrix's will, in the year 1818, William Murray was aged thirty-two years, Hugh twenty-six, Hannah twenty-four, and Mary twenty-two.

*Argument.*

Mr. Gayer, for the petitioner, argued that under the limitations of the codicil, William and Hugh were entitled, for life, each to a moiety as tenants in common, with remainder after their death to the children of William. The difficulty of construction arose from the use of the word "them," which the testatrix had, by the

subsequent limitations, translated to mean children—that is, the children of William. The effect of this construction would be to give Hugh and William an estate for life, with remainder to the children of William: *Jeffrey v. Honeywood* (a); *Doe v. Burn-sall* (b).

That it would be a very improbable intention to ascribe to the testatrix, that as children were born to William down to the death of the last tenant for life, when the period of distribution would arrive, the estate of their father and uncle should be constantly diminishing.

Mr. *Hughes* and Mr. *Boyle*, for the respondent.

The testatrix intended to leave Hugh and William, by her codicil, precisely in the same position as she had placed them by her will. William had two children; and she makes no alteration by her codicil, but that of substituting the children of William for her nieces Hannah and Mary; she declares that she revokes her will so far only as relates to her said nieces. It cannot be argued, from the use of the word “children,” in the subsequent limitations of the codicil, that she meant the children of William; for in the latter limitations of the will she applies the same term children to the same nephews William and Hugh, and her nieces Hannah and Mary.

Mr. *R. H. Mills*, in reply.

In whatever sense she used the word “children” in the will, she cannot be taken to have applied it to William, Hugh, Hannah or Mary; for it appears by the answering affidavit of the respondents, that these were all then over the age of twenty-one years; whereas the last limitation in the will provides for the event of any such “children” dying under the age of twenty-one years. But whatever difficulty might arise in the construction of the revoked clause of the will, the Court is now called on to construe the codicil. In that codicil the testatrix has substituted for her two nieces a particular class, whom she herself designates as “children,”

(a) 4 Mad. 398.

(b) 6 T. R. 30.

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namely the children of William. We submit, then, that when in the subsequent limitations of the codicil she speaks of "children," she refers to those whom she has expressly so named, and does not include their father and uncle; she professes to revoke her will only as relates to her two nieces; but if the children of William, begotten or to be begotten, are to take in common with their father and uncle, the estate of the latter would be constantly diminishing, as children were born to William down to the period of distribution.

The LORD CHANCELLOR.\*

*Judgment.*

In this case the lands are devised by the will to Daniel and John Murray, for their lives, as tenants in common, with devises over; and by the codicil, after revoking those devises over, there is a devise, after the death of them, or of either of them, to the use of the testator's nephews William and Hugh Murray, and all and every the child or children of his nephew, William Murray, begotten or to be begotten, as tenants in common, and of the respective heirs of their bodies lawfully issuing, with cross remainders between them. William Murray had two children, who are still living, and who were alive in 1828, when Daniel Murray died; they were therefore living when the several devises of each moiety took effect by the deaths of the two tenants for life.

This devise to William, Hugh Murray and the children of William, is not an immediate one; it is postponed to, and to take effect, as to each moiety at, the respective times of the death of each tenant for life; and these are the periods at which the persons who are to take, as a class, are to be ascertained. The law on this point is thus laid by Downes, C. J., in his admirable judgment in the case of *Crone v. O'Dell* (a): he says:—"When the enjoyment of the thing devised is, by the testator's expressed intent, not to be immediate to those among whom it is finally to be divided, but is postponed to a particular period or to a particular event, then those who answer the general description at that period, or when

(a) 1 B. & B. 459.

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the event happens on which the distribution is to be made, are entitled to take." There are other passages to which I need not refer, as the case before me is so obviously to be governed by the rule I have quoted.

Here is a future devise to a class of persons, some of whom exist and are named, and some of whom are uncertain and cannot be ascertained until the times at which the devises are to take effect in possession; but when those times arrive, the rule excludes from the class who are to take all those not then *in esse*. This obviates all the inconvenience which formed the leading objection to admitting the children of William to take along with their father and uncle, Hugh and William. It is also an answer to the difficulty which is supposed to arise from the use of the word "them" in the subsequent clause of this devise; for this term will then refer to all that constitute the class, and have the operation plainly intended, by creating cross remainders between all the individuals of that class.

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*Judgment.*

WHITE v. VILLIERS.

1853.  
May 2, 3.

VILLIERS, being seised of real estates, subject to mortgages and judgments, devised the estates to the plaintiffs, upon trust to sell and pay the charges.

The inheritor was a minor, a ward of Court; and by an order in the minor matter, the plaintiffs were directed to file a bill to carry the trusts of the will into execution.

The bill was filed accordingly, a receiver appointed, and a report made, ascertaining the charges upon the estates.

The case now came on to be heard upon report and merits. It was alleged and admitted, that the fund would be insufficient for payment of the charges.

The plaintiffs claimed the costs of the suit in priority to the judgment creditors.

Trustees of real estate, upon trust to sell for the payment of charges, are entitled to the costs of a suit out of the surplus only, after payment of the charges. Where the fund was deficient, the Court refused them costs.

1853.  
*Chancery.*  
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 Argument.

Mr. *Martley*, Mr. *Miller* and Mr. *Warren*, for the petitioners.  
 An executor gets costs of a suit to administer personal estate, in priority to legatees and creditors. This case is the same in principle. It is not suggested that the plaintiffs have not acted *bona fide*.

The *Attorney-General*, Mr. Serjeant *Christian*, Mr. *Deasy*, Mr. *Jenkins*, Mr. *Synan* and Mr. *R. Ferguson*, for judgment creditors.

*Judgment.*

The LORD CHANCELLOR\* said that the case of the executor was not analogous, and held that the trustees could not stand in a better position than their testator, and were only entitled to costs out of the surplus, after satisfaction of the charges.

\* The Right Hon. M. BRADY.

### HOLMES v. HOLMES.

*July 22.*

An order cannot be made in a cause petition against a minor, without proofs.

THIS was a cause petition, and prayed the removal of temporary bars, in aid of an ejectment at law. The petition was verified by the short affidavit pursuant to the statute. The respondent was an infant, and did not file any affidavit. There were not any proofs made by the petitioner.

Mr. *Deasy* and Mr. *Graydon*, for the petitioner.

Mr. *Warren*, for the respondent, submitted that a decretal order against an infant could not be made except before formal proofs.

The LORD CHANCELLOR\* concurred, directing the case to stand over, and ordered the petitioner to pay the costs of the day.

\* The Right Hon. M. BRADY.

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*Chancery.*

DILL v. BROWN.

June 2.

THE bill in this cause was filed by the Rev. R. Dill and James Flemming, as executors of the late Maria Magee, to administer her estate, and carry into execution the trusts of her will; by which (amongst other charitable gifts) she bequeathed to Dill, and to J. B. and J. G. the sum of "£20,000, in trust, to apply the same to the building and endowment of a college for the education of young men in preparation for the Christian ministry, in connection with the General Assembly of the Presbyterian Church in Ireland: the same to be built where the said trustees or the majority of them should decide; and to be under such rules, regulations and discipline as they should determine—subject to the advice and directions of the General Assembly in the first instance, and from time to time as there might be occasion for altering the same."

J. B. and J. G. were made defendants to the suit; but neither the General Assembly nor any one to represent them were.—However, that body, by a committee appointed for the purpose, presented a petition praying for leave to intervene in the office as if they were parties to the cause, and that the costs incident to their doing so should be allowed to them out of the £20,000. The petition was moved at the original hearing of the cause; whereupon it was ordered that this committee, on the part of the Assembly, should be at liberty to intervene, if they should think fit; and all questions as to any claim by them for costs in respect of such intervening were reserved until the final hearing. The decree

A testatrix bequeathed to trustees £20,000, in trust, for the building and endowment of a college for clerical students connected with the General Assembly of Irish Presbyterians; the same to be built where the trustees should decide, and to be under such rules, &c., as they should determine, subject to the advice and directions of the Assembly. The suit was for the administration of the assets of the testatrix, and to carry into execution the trusts of her will.—

*Held*, that the costs incurred by the trustees in the settlement of a scheme for the due application of the £20,000, were

to be borne by that bequest, and not by the general residuary fund.

The General Assembly (who were not parties to the cause) presented a petition for leave to intervene in the office as if they had been joined, and that their costs of doing so might be allowed to them out of the £20,000; but the order made on the petition merely provided that they should be at liberty to intervene, if they thought fit, and reserved until the final hearing all questions as to any claim for costs by them. Under this order they proceeded before the Master.

*Held* (at the final hearing), that they were not entitled to their costs as against any fund, since they were not parties to the cause so as to be liable to costs; and the order permitting them to intervene did not provide for their costs as prayed by the petition.

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directed that the trustees might lay before the Master a scheme for the application of the £20,000, pursuant to the trust in the will.

When the cause went into the office, the trustees accordingly filed a charge by way of scheme for the desired purpose; and to this the intervenients put in a discharge, by which they claimed the right of fixing the site of the college, and opposed the plan of the trustees in other respects, and submitted one of their own. They succeeded to some extent in altering and modifying that scheme, but failed for the greater part (in determining the site amongst other things); and considerable expense was incurred in the course of the proceedings upon the charge and discharge; but there was a large residuary fund.

The cause now came on for final hearing, upon report unexcepted to and merits; and the sole questions were as to what parties should get costs, and out of what fund the costs to be given should come?

*Argument.* Mr. Martley, Mr. Sproule and Mr. S. B. Miller, appeared for the plaintiffs.

Mr. F. Fitzgerald and Mr. J. Peebles, for the trustees, argued that the costs incurred by them, in the prosecution of the inquiries as to the application of the £20,000, ought to be borne by the general residuary fund, and not by the particular fund; and that if the Court should allow any costs to the intervenients, they also must be taken from the former fund. They cited *Attorney-General v. Gladstone* (a); *Wilson v. Squire* (b); *Williams v. Armstrong* (c).

Mr. Brewster and Mr. Joy, for the intervenients, contended that they were entitled to their costs: they had leave to intervene for the purpose of seeing to the proper application of the bequest; they had partly succeeded in carrying out their views; and the question as to their costs had been expressly reserved until now. They would prefer that these costs should be paid by the residuary fund: *Attorney-General v. Shore* (d).

(a) 13 Sim. 7.

(c) 12 Ir. Eq. Rep. 356.

(b) Ibid, 212.

(d) 11 Sim. 592, 615.

Mr. *Brooke*, Mr. *Andrews* and Mr. *A. M'Farland*, for the principal residuary legatees, resisted the claim of the intervenients. They ought not to have any costs as against any fund, and certainly not against the residue; the more so, as they had got leave to go into the office on a petition which expressly prayed that they should have their costs out of the specific bequest. They had no right to advance a scheme of their own at all: the order permitted them to intervene, not as parties to the cause (as they had asked), but simply to watch the proceedings—and this at their own risk, in every respect;—nor had they altered the scheme of the trustees in any substantial way. Neither ought the trustees to have their costs out of the residuary fund—they were only entitled as against the £20,000; for it was a rule of equity, that expenses incurred in carrying on inquiries with reference to the application of a particular bequest should come out of that bequest and not from the general fund: *Jenour v. Jenour* (a); *Shaw v. Pickthall* (b); *Jones v. Mitchell* (c); *Barton v. Cooke* (d); *Skrymsher v. Northcote* (e); *Attorney-General v. Earl of Winchelsea* (f).

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*Argument.*

Mr. *C. Andrews*, Mr. *E. Molyneux*, Mr. *A. Crawford* and Mr. *M. Brady*, appeared for other parties.

The LORD CHANCELLOR.\*

From the beginning of the argument, I have had very little difficulty as to the decision which I should pronounce in this case. The trustees are clearly entitled to their costs; and I do not understand that this is disputed. As to them, the only question raised is, out of what fund are their costs to be paid? The rule of the Court on the subject has been correctly stated by the Counsel of the residuary legatees. The residuary fund is not liable to the expense of inquiries relating to a particular bequest. That bequest itself must

*Judgment.*

(a) 10 Ves. 562.

(b) Dan. Exch. Rep. 92, 95.

(c) 1 Sim. & S. 290.

(d) 5 Ves. jun. 481.

(e) 1 Swanst. 566.

(f) 3 Bro. C. C. 373; 8. C. 2 Cox, 364.

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bear the burthen; therefore, the trustees here are to have their costs out of the £20,000.

With respect to the intervenients, I am of opinion that they are not entitled to costs as against any fund, and they must bear their own. They are not parties to the cause, so as to be subject to costs; there was no liability on their part; and the order which permitted them to intervene did not provide for their costs in the manner prayed by their petition.

I therefore will not now give them costs which they have incurred simply on their own responsibility.

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O'BEIRNE *v.* CORNWALL.

Nov. 3, 4.

THE plaintiff, Jane Ormsby O'Beirne, was entitled to considerable sums of money, which were invested by the defendant John Cornwall, on various securities in Ireland, as her agent, and the interest of which was received by him and transmitted to the plaintiff, who resided in England. The defendant had been for many years the agent and confidential adviser of the plaintiff and her family, though he never received any remuneration from her. He was also the land agent of Mr. Gustavus Lambert, for whom he had obtained from the plaintiff's family considerable sums, amounting to £8450, which were lent on the security of judgments affecting Mr. Lambert's estates in the county of Meath.

The defendant had acted gratuitously as the agent of the plaintiff, transmitting to her the interest of charges to which she was entitled. One of the charges was paid to the defendant, which the plaintiff directed him to invest on a specified real security, which he was unable to do; but which, without her authority, he lent to L., for whom he was also agent, and who was indebted to him, on the security of a bond and warrant of attorney to enter judgment. He inclosed the bond and warrant to her in a letter, in which he stated, contrary to the fact, that the money had been applied to pay off a charge on his estate. L. afterwards, on his son's marriage, conveyed a part of the estate in trust to pay off charges on his estate, another part to the use of his son and his issue; and the lands of C. in trust to secure his debt to the defendant. The defendant, in several letters, offered to give the plaintiff's claim priority over his demand on the lands of C. L. being dead, leaving no assets to pay the plaintiff's claim, the Court, on a bill filed by her, declared the plaintiff entitled to a specific performance of the contract contained in the letters, and that the defendant was a trustee for the plaintiff, as to so much of his security on the lands of C. as would be sufficient to pay her claim; and ordered that he should execute a deed declaring the trust.

In 1844, the executors of the late Archdeacon of Meath, who owed the plaintiff a sum of £3000 Irish, called upon the plaintiff to receive that sum; and in July 1844, the defendant transmitted to her a receipt, together with a release to be signed by her, in order to obtain payment of the sum of £3000. The receipt and release were returned, duly signed, to the defendant, with directions to invest the money on the security of the estates of Lady Geary, which had been suggested by the defendant himself. In reply, the defendant wrote the following letter on the 10th of August, 1844:—

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“MY DEAR MISS O'BEIRNE—I regret to say that I was unable to place the Archdeacon's money on the Neville estate, as Lady Geary has got money in London at £4 per cent. She has requested me to inquire of you if you will take this rate of interest until you can make some arrangement to place your money at a higher rate. I have written to Lady Geary, saying, that it is always usual that a notice of six or twelve months should be given before withdrawing money, or reducing the rate of interest. My advice would be for you to offer to take the £4½ per cent., and I will do all in my power to have your offer complied with, to save the loss of interest. There was a claimant on Mr. Lambert's estate, who had a charge for the same sum that the Archdeacon's was. I paid him the amount, and send you Mr. Lambert's bond and warrant for the amount, so that you lose no interest on the money. I fear that this sum will not be kept very long, nor the other sums he has of yours, as he is about selling the Westmeath estate. When this is disposed of, it will pay off all the claims on his property. Of late, English money has become so plenty here, that any sum can be got at £4 per cent. I send this under cover to my son, by a gentleman who is going over. He will forward it to you by a safe opportunity. I am obliged to leave Dublin next week for Harrogate, with Mrs. Cornwall, who has been in bad health for some time; when she is better, and that my son Austyn comes over to remain with her, I propose leaving them for a week, and going up to London. If possible I will run down to see you. Pray present my best regards to your sister and Miss Wren.

“Believe me, my dear Miss O'Beirne, your faithful servant,

“JOHN CORNWALL.”

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No assignment of the charge, which was alleged to have been paid off, was ever obtained, and no judgment was entered on the bond, which, with the warrant of attorney, was transmitted to the plaintiff. The defendant stated in his answer that, in point of fact, no charge was paid off with the money; but he gave no account or evidence of the manner in which it had been applied.

The interest on the several sums of £8450, to which the plaintiff had become entitled, and the £3000 thus lent by Cornwall, was regularly transmitted to the plaintiff by him up to August 1846. In July 1848, a large arrear of interest having accrued, the plaintiff employed Mr. Tatlow, a solicitor, to inquire into the matter, who ascertained that no assignment of any charge had been obtained; and that on the 2nd of June 1847, Mr. Lambert, with the privity of the defendant Cornwall, had executed three deeds; by the first of which he had conveyed a part of his estates to trustees, to discharge the debts affecting the said estates, and by the second, he had conveyed the remainder thereof, save the lands of Clegarrow, for the benefit of his son and his issue, on his marriage with Lady Fanny Lambert. The plaintiff's debt of £3000 Irish was omitted from the deed, by which the debts were secured, though her other claims were included in it. By the third deed, the lands of Clegarrow were conveyed to the use of the defendant John Cornwall, in order to secure him £12,600, which was claimed to be due to him by Mr. Lambert. Mr. Tatlow proved that, having ascertained these facts, he had an interview with the defendant Cornwall, when, after a conversation, the result of which was that the £3000 was unsecured, the defendant stated, that "even so it was immaterial, as he had the means fully securing the plaintiff the amount of the bond, by giving her a prior claim upon the lands of Clegarrow, which he said had been conveyed by Mr. Lambert for the defendant's security; and to satisfy me of his power to do so, he produced to me the deed."

Several letters of the defendant's were proved and relied on by the plaintiff, the material parts of which were the following passages:—

In a letter of the 11th of August 1848, the defendant said:—  
 "I wrote to you long since, saying I had no papers, deeds or docu-

ments, belonging to you. The original deed from Mr. Lambert was brought over from Ireland when you were all going to reside in England. The bonds and warrants of judgments were sent to you when the money was lent, and these claims are annexed to the marriage settlement of young Mr. Lambert, on his marriage with the Hon. Lady Frances Conyngham, which settlements have been registered. Young Mr. Lambert is at present with the Marquis of Conyngham, who, I believe, has led him to calculate that he will be able to let him have a portion of Lady Fanny's fortune towards the payment of claims on Mr. Lambert's property. I have also given directions to have the Westmeath estate divided into lots, so as to have it sold without delay, when all your charges will be paid in full, as the Incumbered Estates Bill has received the royal assent."

In a letter of the 18th of September 1848, the following passage occurred:—"The principal difference between Mr. Tatlow and me was, that he thought all the claims you had on Mr. Lambert's estates were English money. I find your solicitors did not redocket or enter judgments on all the securities that were passed, and the last £2769 has been left out of the settlements; but as there was an estate made over to me previous to the marriage, for the payment of a debt of £12,600 that was due to me, I will give that claim of yours priority to my claim, so that you nor yours shall not lose a shilling."

On the 28th of December 1848, the defendant wrote as follows:—

"I some time back wrote to you, that if any of the charges you had were not secured under young Gustavus Lambert's settlement, I would give priority on the estate that was made over to me for £13,000 that was due to me; this, with the £5000 that Mr. Lambert's life is insured for, to cover my advance, and what I am security for. I am still ready to do the same, provided law and ruinous costs are avoided. I fully agree with Mr. Worthington's views, that they would only retard the payment of your money, when every exertion is making to bring the estate to a sale, which a principal can do much quicker than a claimant can do. If I had not a full conviction that every thing that can be done is doing, I would

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not have offered to give the priority on the estates assigned to me for the payment of the money due me."

In a letter of the 29th of January 1849, to J. H. O'Beirne, Esq., a relative of the plaintiff, was the following passage:—"I wrote to Miss O'Beirne more than once, that if there was any bond of Mr. Lambert's to her that was not included in that settlement, I was willing to give it a lien on the estate that was conveyed to me for the payment of £12,600 that was due me. I have again written to Miss O'Beirne on this subject, to whom I send this letter open. I am not a solicitor; and if there has been any omission in law, Miss O'Beirne had always her own professional gentleman. I was never an authorised agent to employ any person in Ireland to act for her."

In a letter of the same date, to the plaintiff:—"I again repeat, when Kilbeggan is sold, any bond or security that you hold of Mr. Lambert's, I am ready to give it priority over my claim on the estates in Meath."

The same offer was repeated in two other letters, of the 8th of February 1849, and 7th of March 1849.

The bill was filed on the 9th of August 1850. It prayed that the defendant John Cornwall might be declared liable to make good the sum of £3000, late Irish currency, and interest thereon from the 1st of August 1846, and for that purpose that he might be declared a trustee for the plaintiff, as to so much of the sum of £12,600 secured to him by the deed of the 2nd of June 1847, as represented the said sum of £3000, Irish, and the interest due thereon; and that as such trustee, or pursuant to the agreement contained in his letters, he might be compelled to execute the proper and necessary deeds for securing to the plaintiff the payment of the said sum of £3000, and that it might be referred to the Master to settle said deeds; and in case the said John Cornwall had, to the prejudice of the plaintiff, disposed of, or in any way alienated, the said sum of £12,600, then that he might be declared responsible to the plaintiff for said sum of £3000 and the interest due thereon, and might be directed to pay same; and an injunction to restrain him from assigning or disposing of the said charge on the lands of Clegarrow, save subject to the plaintiff's rights, pending the cause; and, if necessary, that an account of the

personal estate of Gustavus Lambert (who was dead) might be taken.

The defendant, by his answer, stated that he never was the general agent of the plaintiff, or had any general authority as her agent; that in every case in which he acted as agent for her, he acted under her special direction and authority; that he never required or received, or was offered, any remuneration as the agent of the plaintiff, and was induced to act solely by feelings of friendship for her and her family; that if judgment had been entered on the bond within a reasonable time, it would have been a charge on Mr. Lambert's estates, and would have been an ample security for the money; but by reason of the plaintiff's negligence in not causing judgment to be entered until after his death, the security was lost. That in respect of the security for the £3000, he acted solely as the agent of Mr. Lambert, and without any authority from the plaintiff; that the offer to give the plaintiff a lien on the lands of Clegarrow, in priority to his claim, was intended as collateral security to the judgment which he believed had been entered up against Mr. Lambert, and had given the plaintiff a charge on his estates; that it was not his business, nor had he any authority from the plaintiff, to have judgment entered on the bond; and he submitted that the plaintiff's relief, if she was entitled to any, was at law, for there was no relation of trustee and *cestui que trust* between the parties.

Mr. Serjeant *Christian*, Mr. *Martley*, and Mr. *F. W. Walsh*, for the plaintiff.

The plaintiff is entitled to twofold relief. First, she is entitled to a personal decree against the defendant for this sum of money. Secondly, she is entitled to a lien on the charge on Clegarrow, in priority to any intermediate incumbrance on it created by the defendant. The defendant, by his acts, had in 1844 placed himself in a fiduciary position, with respect to the plaintiff. He took upon himself, without any authority from the plaintiff, to lend the money. Although there may be a remedy at law, there is a concurrent one in this Court. The letter of August 1844 contained a wilful,

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and, in equity, a fraudulent misrepresentation; it stated that the money had been applied in payment of a charge : *Burrowes v. Locke (a)*.

The plaintiff is also entitled to a charge on Clegarrow, on general grounds of equity, and also by way of specific performance of the contract contained in the defendant's letters. The defendant not only misrepresented the facts to the plaintiff, but he obtained for himself the security which he ought to have procured for the plaintiff. The defendant's antecedent liability, by reason of his neglect of his duty as her agent, is ample consideration for the promise contained in the letters; but besides that, they contain on the face of them another consideration, viz., forbearance from legal proceedings against Mr. Lambert and his estates.

Mr. Brewster, Mr. F. Fitzgerald, and Mr. George Crawford, for the defendant.

The plaintiff is not entitled to a personal decree for payment of this sum, nor is she entitled to a decree for a specific performance of this alleged contract. The case of *Burrowes v. Locke* was a case between trustee and *cestui que trust*. No such relation existed between the parties in this case. A trustee is a person who has a legal right to something which another is beneficially entitled to. The plaintiff was both legally and beneficially entitled to the money. The defendant had no right to it whatever. When the defendant received the money, the relation between them was the simple one of debtor and creditor. The defendant was not an agent, in the sense which would make him liable, except for gross negligence : *Shields v Blackburne (b)*. He received no reward, and was acting merely as a friend of the plaintiff, who might have repudiated the loan at once, and have called on him to pay back the money. Instead of doing so, she adopted it for four years, and neglected to enter judgment, although Mr. Lambert lived until 1850. She must have known that judgment had not been entered, for the warrant of attorney was sent with the bond : 2 *Eq. Cas.*

(b) 10 Ves. 470.

(b) 1 H. Bl. 561.

*Abr.*, p. 707. *Luke v. Bridges* (a). In a case of a complicated account between principal and agent, the Court assumes jurisdiction, but this is a case of one transaction if the relation existed at all: *King v. Rossett* (b). The promise contained in the letters was a voluntary one, and without consideration, and was not accepted by the plaintiff. *Walker v. Barnes* (c).

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Mr. Vance, for the representative of Gustavus Lambert.

The LORD CHANCELLOR.\*

I am clearly of opinion that the plaintiff is entitled to relief, and I shall give her the benefit of the security obtained by Mr. Cornwall against the estate of Clegarrow, which has been subjected to a charge of £12,600 in his favour. I am of opinion that I ought to give her that relief, in pursuance of a plain, unequivocal and unconditional contract on the part of Mr. Cornwall.

Nov. 4.  
*Judgment.*

There are various stages of this transaction, as proved and detailed by the evidence. The state of facts, when Mr. Cornwall wrote to Miss O'Beirne the letter of August 1844, was this: she had for many years availed herself of his gratuitous services, and appears to have reposed unbounded confidence in him; he managed her pecuniary affairs for her, she having resided in England. In the year 1844, £3000, late currency, due by the late Archdeacon De Lacy, became payable to her, and she furnished Mr. Cornwall with the proper documents to enable him to receive it, which he accordingly did. She appears to have had certain charges upon the estate of Lady Geary, not personal charges, but charges affecting lands. She had also charges on the estate of Mr. Lambert, which were also real securities; and it appears from the letter of August 1844, that the intended application of the money, and the purpose for which she placed it in the hands of Mr. Cornwall, was for an investment on the real estate of Lady Geary; so that the inception of the transaction plainly indicates that Miss O'Beirne intended, and he understood her to mean, not that the money should be lent on

(a) *Proc. in Chan.* 146.

(b) 2 Y. & J. 33.

(c) 3 *Mad.* 247.

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personal, but on real, security. He failed to prevail on Lady Geary to borrow it; and on the 10th of August 1844, he wrote this letter, which is all-important in every part of the case.—[His Lordship read the letter.]

Now, it is perfectly plain that, in thus disposing of the money, he acted without any authority or direction from this lady at all; and if there were any discretionary power in relation to the disposition of the money vested in him, it must have been, with regard to the original security indicated, a power and a trust to invest it in real security. He took a bond and warrant of attorney, which was not a real security, but which might have been converted into one; but he omitted to enter judgment on the bond, and transmitted it and the warrant to the plaintiff, not telling her of this omission; and thus, in point of fact, what he gave her was nothing more than a personal security.

It is perfectly true that it was in the power of this lady to ratify what had been done, and, if she thought proper, to accept this as a personal security; but when the defendant, who had, without previous authority, so disposed of this money, relies on her ratification of his act, he is bound to show distinctly that she ratified it with all the notice which she ought to have had, and which he ought to have given, of every part of the transaction. But especially, he was bound not to have misrepresented any thing which could have influenced her judgment in deciding whether she would take the security or not. When I look at what Mr. Cornwall has said, and what is proved, I find him defending his own neglect or omission, by fixing this lady with constructive notice of that omission, inferring from her presumed knowledge of the practice of the Court, that she must be taken to have known that he had not done what it was his duty to have done. I cannot possibly allow him the benefit or protection of any such presumption. It is plainly more just to put on him the obligation of telling her what he knew to be the fact, than to give him the benefit of constructive notice to her of a fact which, we may be assured and convinced, never entered into her consideration.

There is another remarkable circumstance in this case. A sum

of £2769 is paid to Mr. Cornwall on a particular day ; what has become of it? To whom was it paid? Was it paid to an incumbrancer on Mr. Lambert's estate? It is confessed that it was not. Was it paid to Mr. Lambert? Presumptively it was paid to him, because he gave his bond for it. But if it were actually paid to him, it would have appeared to his credit in the accounts. If it do not appear there, and is not proved to have been paid away, what is the presumption? That Mr. Cornwall, who was Mr. Lambert's creditor, agent, and had money dealings with him, kept this money on account of his own debt, and applied it to his own purposes. Surely, from the nature of the transaction, we ought to know in what manner the money was applied. Yet on this subject, the defendant, a man of business, who must have kept some account of the transaction, has left the Court totally in the dark.

But the strongest of all the circumstances in this case is the positive misrepresentation of a material fact in the letter which I have read. I put entirely out of view the inference collected from the language of this letter, that the incumbrance had been assigned, or that she was entitled to have it assigned—whether either the one or the other, or neither of them, be warranted. The substantial misrepresentation was that the money was applied to pay off a charge on an incumbered estate of an embarrassed man. It is obvious that a lender of money would be in a very different position if the money were applied to discharge an incumbrance, from that in which she would have been, had the incumbrance remained unpaid, and the money been borrowed on a new security, for Mr. Lambert's personal use and accommodation. Mr. Cornwall tells the plaintiff in distinct terms, but untruly, that he had paid off a person having a charge on the estate to that amount. There is therefore, as between these parties, one of whom reposed a confidence and a trust in the other, a distinct misrepresentation of a material fact, by the party in whom that confidence and trust was placed. With regard to the observation of Mr. *Crawford*, that all these things are foreign to the transaction, I must say that where it is the duty of a person (as it was the duty of Mr. Cornwall, when he undertook and invested himself with this

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*Judgment.*

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 Judgment.

authority) to disclose every thing fully and fairly, it would be very dangerous to allow him to speculate on the question whether the misrepresentation or concealment was in a matter more or less material. If there be a statement of a matter untrue in point of fact, I should have great difficulty in relieving the party in a fiduciary situation from the consequence of that mis-statement, whether the degree of materiality was great or the reverse. In this case, however, we have it established that the plaintiff represented untruly that the estate which the defendant had looked to as her security was discharged by her money, whereas in point of fact it remained charged as it was before. The consequence flowing from that is that, in my mind, the subsequent deeds, and the subsequent conveyance to the defendant, cannot in this Court be allowed to stand in the way of the plaintiff.

The liability of the defendant being established, there is not any difficulty in the remainder of the case. Nothing can be more explicit than the plaintiff's own statement of his liability, and his unconditional offer, in the first instance, to make her compensation. In the letter of the 11th of August 1848, he says, "These claims are annexed to the marriage settlement of young Mr. Lambert, on his marriage with the Honorable Lady Frances Conyngham." That turns out not to be the fact. He first tells her that the claim was included in the settlement, and then in a subsequent letter of the 18th September 1848, that "The last £2769 has been left out of the settlements; but as there was an estate made over to me previous to the marriage, for the payment of a debt of £12,600 that was due to me, I will give that claim of yours priority to my claim, so that you nor yours shall not lose a shilling."

The obligations, in conscience and law, which the defendant had incurred, were all probably in his mind when he made this offer, and undertook, as it was proper and just, and he was bound to do, that she should not lose one shilling in the transaction. In a letter of the 28th December 1848, he says, "I some time back wrote to you that if any of the charges you had were not secured under young Gustavus Lambert's settlement, I would give priority on the estate that was made over to me for £13,000 that was due to

me; this, with the £5000 that Mr. Lambert's life is insured for, to cover my advance, and what I am security for. I am still ready to do the same, provided law and ruinous costs are avoided."

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*Chancery.*  
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v.  
CORNWALL.

The defendant has not any right, after those letters, to retract or qualify or annex a condition to this offer. I am therefore clearly of opinion that the plaintiff is entitled to have the benefit of the security on Mr. Lambert's estate, vested in Mr. Cornwall, and I shall accordingly decree a specific performance of the contract.

*Judgment.*

Declare the plaintiff entitled to a specific performance of the defendant John Cornwall's agreement, contained in his letter of the 18th day of September 1848; and that the said John Cornwall was, from the date of the said letter of the 18th day of September 1848, a trustee of so much of the sum of £12,600, in the deed of the 2nd of June 1847, made between Gustavus Lambert of the first part, the defendant John Cornwall of the second part, Francis Hamilton of the third part, and John Cornwall the younger of the fourth part, in the pleadings mentioned, as may be necessary to pay the plaintiff the principal sum of £2769. 4s. 7d. sterling, with interest thereon from the 1st day of August 1846, at £5 per cent. per annum. Declare that the plaintiff has a lien or charge on the said sum of £12,600, for the payment of the said sum of £2769. 4s. 7d., and interest. Let the defendant John Cornwall execute to the plaintiff such deed or assurance as may be necessary for declaring such trust, and giving to the plaintiff such lien or charge, free from all incumbrances created by the said defendant John Cornwall, subsequent to the said letter of the 18th day of September 1848; and in case the parties differ as to the frame of such deed or deeds of assurance, refer it to the Master in rotation to settle the same; and let the defendant John Cornwall lodge the said deed of conveyance, of the 2nd day of June 1847, in the office of the said Master. Let the said defendant John Cornwall pay the plaintiff the costs in this cause, and the costs of

*Decree.*

1852.  
*Chancery.*  
**O'BEIRNE**  
*v.*  
**CORNWALL.**  
*Decree.*

obtaining such deeds of assurance, and any proceedings incident thereto, and also the costs of raising a personal representative to Gustavus Lambert, deceased, in the pleadings mentioned. Declare the defendant John Sandes entitled, as against the plaintiff, to his costs in this cause; and let the plaintiff have such costs over against the defendant John Cornwall, and refer it to one of the Taxing-masters of this Court to tax such costs.

*Reg. Lib. Gen. 7, fol. 179.*

April 22, 23,  
 24.

**HAYES v. WOODLEY.**

A lease for lives renewable for ever was vested as to two-thirds in A, and one-third in B, subject to an underlease for years, at a profit rent. From 1779 to 1822 the head rent was paid by the subtenant who was in possession, and two-thirds of the profit rent to A, but it was not proved that any thing was paid to B. In 1822 the interest in the underlease

By indentures of lease and re-lease, bearing date the 17th and 18th of October 1706, the Hollow Sword Blade Company demised the lands of Browningstown and Knocknamaderone to Richard Daunt, for three lives, at the rent, during the then war, of £18, and £20 after the end of the said war, with a covenant for perpetual renewal on payment of a renewal fine of £10.

On the 7th of April 1808, Richard Daunt conveyed his estate and interest to William Gough, on whose death it descended to Thomas Gough.

On the 12th of June 1723, Thomas Gough demised, or agreed to demise, to Thomas Harrison, thirty-three acres of the lands of Browningstown for 400 years, at the yearly rent of £1. 6s. 0d. an acre.

In 1748, Charles Smith was entitled to the reversion in fee. The was conveyed to the defendant, subject to the entire rent reserved by it. He continued to pay the head rent and the two-thirds of the profit rent to A, and in 1832 he purchased the reversion in fee.

*Held*, on a bill filed by the representative of B, to have the benefit of a decree for a renewal in respect of A's interest—

1st.—That no presumption of the extinguishment of B's third of the profit rent, or of a conveyance of his third of the reversion, arose.

2nd.—That the retention of the profit rent gave the defendant no title, under the Statute of Limitations, as the third of the head rent must be presumed to have been paid or retained by him as the agent of those representing B's interest.

interest in the lease of 1706 was vested in Mary Gough for life, and after her death, as to two-thirds, in John Wood, and as to one-third in Eleanor Murphy, subject to the lease of 1723. On the 27th of August 1748, Charles Smith executed a renewal of the lease to Mary Gough. Mary Gough died shortly afterwards, and at her death John Wood and Eleanor Murphy entered into possession of their respective shares.

On the 23rd of July 1778, John Wood demised to Hamilton Crawford and his heirs a part of the lands of Browningstown called Radcliffe's Farm, containing eight English acres, for three lives, at the yearly rent of £9. 12s. 0d., with a covenant for perpetual renewal.

Eleanor Murphy married John Keeffe, and on the 22nd of January 1779, by deed, reciting the last-mentioned demise, John and Eleanor Keeffe, in consideration of £50, conveyed to Hamilton Crawford and his heirs their undivided third part of Radcliffe's Farm, subject to a third of the head rent payable thereout; and it was declared that a fine levied by John and Eleanor Keeffe, as of the preceding Michaelmas Term, to Hamilton Crawford, should enure as to one-third of said portion of said lands to the use of the said Hamilton Crawford and his heirs; and as to the residue of said lands to the use of John and Eleanor Keeffe.

On the 18th of March 1785, John Wood, in consideration of £400, conveyed to Hamilton Crawford and his heirs all his undivided two-thirds of the lands comprised in the lease of 1706, subject to two-thirds of the head rent. Thus Hamilton Crawford was entitled to Radcliffe's Farm in severalty, to two undivided thirds of the remainder of Browningstown, and to two undivided thirds of Knocknamaderone. All these interests he devised to his daughter Matilda, who married Thomas Purcell, and they afterwards vested in her sons William Purcell, Crawford Purcell and Richard Purcell.

On the 11th of November 1780, Eleanor Keeffe conveyed for valuable consideration to Joshua Connor, his heirs and assigns, all the residue of her third part or share of the lands of Browningstown and Knocknamaderone, not theretofore granted to the said Hamilton Crawford by the deed of the 22nd of January 1779. This interest

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*Chancery.*  
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WOODLEY.  
*Statement.*

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*Chancery.*

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*Statement.*

was devised to Joshua Connor Hayes, and by the latter to the plaintiff Joseph Augustine Hayes.

The interest in the sub-lease of 1723 to Harrison came by assignment to Joseph Woodley and Francis Woodley before 1779; and in 1822, the defendant Richard Woodley purchased that interest. The interest under the lease of 1723 was conveyed to him, subject to the entire rent reserved by that lease, which amounted to £43. 2s. 3d., late currency.

The head rent of that portion of the lands was £21; there was therefore a profit rent of £22<sup>+</sup> 2s. 3d., to two-thirds whereof Thomas Purcell was entitled, and to one-third Joshua Connor Hayes. Richard Woodley and the persons under whom he derived were from 1779 in the habit of paying the head rent of £21, and handing over to Thomas Purcell his proportion of the profit rent, but there was no evidence of the payment of any portion of the profit rent to Joshua Connor Hayes.

In 1828, Richard Woodley purchased the reversion in fee from Lord Gort, in whom it was then vested. In 1832, before he had obtained a conveyance, the last surviving life in the renewal of 1748 being dead, he caused notice to be served, in the name of Lord Gort and his trustee Mr. Vereker, on George Atkins and John M'Cormick, the trustees for the defendants Purcell, who were then minors, to show title to a renewal, to nominate lives and to pay the renewal fines. No notice was served on Joshua Connor Hayes. On the 20th of April 1832, a bill was filed for a renewal by Thomas Purcell and his minor children against Richard Woodley, Lord Gort and Mr. Vereker, but without making Joshua Connor Hayes a party to the suit. Richard Woodley, by his answer, claimed to be entitled to Eleanor Keeffe's third of the lands. A decree was made in the cause on the 7th of February 1834, whereby it was decreed that the plaintiffs were entitled to a renewal of the lease of the 18th of October 1706, on payment of the sum due for rent, and renewal and septennial fines and interest; and it was referred to the Master to ascertain the sum due for such rent, fines and interest; and it was further declared that such renewal should, on payment of such portion of said rent, and renewal and septennial fines and

interest, as said Master should report the said Richard Woodley bound to contribute, be in trust for said Richard Woodley as to that portion and interest in the lands comprised in said lease, which formerly belonged to Eleanor Keeffe.

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*Chancery.*  
HAYES  
v.  
WOODLEY.  
—  
*Statement.*

After the decree was pronounced, Richard Woodley obtained a conveyance of the reversion, and served a notice to quit, and brought an ejectment against the Purcells and Joshua Connor Hayes in Easter Term 1836. No defence was taken by the latter, and a consent for judgment was given by the Purcells, who filed a supplemental bill, and obtained an injunction against proceeding in the ejectment. In his answer to the supplemental suit, Richard Woodley admitted that he had been mistaken in claiming title to Eleanor Keeffe's third of the lands. By a decree in the supplemental cause, pronounced on the 10th of November 1840, it was ordered that Richard Woodley should execute a renewal of the lease of the 18th of October 1706, and it was referred to the Master to settle a proper deed of renewal. No renewal was executed, and in 1847 Crawford Purcell's interest was conveyed to the defendant Richard Woodley. In May 1847, an ejectment on the title was brought for Eleanor Keeffe's third part of the lands. There was a verdict for the defendant in this ejectment, at the Cork Summer Assizes 1848.

The present bill, which was filed by Joseph Augustine Hayes, the son and devisee of Joshua Connor Hayes, against Richard Woodley, William Crawford and Richard Purcell, prayed that the plaintiff might have the benefit of the proceedings in the suit of *Purcell v. Woodley*, and the decrees made, and the accounts taken therein, and that the renewal decreed might be declared to be in trust for the plaintiff as to that portion of the lands which formerly belonged to Eleanor Keeffe, and was not comprised in the indenture of the 22nd of January 1779, the plaintiff offering to pay his proportion of the renewal fines, an account of the fines, and what was due by Woodley for rent in respect of the plaintiff's third share of the said lands comprised in the lease of 1723, and that the same might be set off against the sum due to him for renewal fines.

The defendant Richard Woodley, by his answer, stated that he never upon on any occasion, directly or indirectly, paid to

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*Chancery.*  
**HAYES**  
*v.*  
**WOODLEY.**  


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*Statement.*

Joshua Connor or Joshua Connor Hayes, or the plaintiff, any sum whatever for their proportion of the profit rent; and that he did not believe that Francis Woodley ever paid any sum on account of the profit rent; because he believed that in the year 1779 Eleanor Keffe sold the reversion and rent to Francis Woodley, and that a conveyance thereof had been executed, which was mislaid; and he relied on a receipt of the 30th of March 1779, signed by John Keffe and Eleanor Keffe, for a part of the purchase-money. He further stated that he always claimed to hold by a title adverse to Joshua Connor and all claiming under him; that there never had been any relation of landlord and tenant between the plaintiff, and those under whom he derived, and the defendant, and that the rent was altogether extinguished; and he relied on the Statute of Limitations.

*Argument.*

Mr. Brewster, Mr. F. Fitzgerald and Mr. Chatterton, for the plaintiff, contended that the retention of the rent by the undertenant gave him no title by the Statute of Limitations: *Doe v. Orenham* (a); *Doe d. Mannion v. Bingham* (b); *Daly v. Bloomfield* (c); *Grant v. Ellis* (d); *Crosbie v. Sugrue* (e); *Sheil v. The Incorporated Society* (f); *Dean and Chapter of Ely v. Cash* (g). That the payment of the head-rent must, under the circumstances, be considered a payment on behalf of Eleanor Keffe. There was no ground for presuming a conveyance to Woodley in pursuance of the alleged contract, because such a conveyance would have been inoperative without a fine; and the fine which was levied to Keffe and wife, it was declared by the deed of 1779, was to enure to different uses. That the alleged contract would only give the defendant an equitable title, which could not prevail against the conveyance of 1780 to Connor, which was registered, and conveyed a legal estate.

(a) 7 M. & W. 131.

(b) 3 Ir. Law Rep. 556.

(c) 5 Ir. Law Rep. 65.

(d) 9 M. & W. 113.

(e) 9 Ir. Law Rep. 17.

(f) 10 Ir. Eq. Rep. 411.

(g) 15 M. & W. 617.

Mr. Serjeant *Christian*, Mr. *Martley* and Mr. *Berkely*, for the defendant *Woodley*, argued that the retention of the rent for so many years, under an adverse claim, not only conferred a title, under the Statute of Limitations, but raised a presumption that the rent had been conveyed or extinguished: *Hillary v. Waller* (a); *Read v. Brookman* (b); *Roe v. Ireland* (c); *Co. Lit.* 307, d; and that there was ample evidence from the receipt produced to show a parol agreement for the purchase of the third of the rent and reversion, of which there had been a part performance.

1852.  
*Chancery.*  
HAYES  
v.  
WOODLEY.  
Statement.

The LORD CHANCELLOR.\*

This bill is filed to have the benefit of a decree in the cause of *Purcell v. Woodley*, by which the plaintiffs in that cause were entitled to have a renewal executed of a lease for lives renewable for ever, made in the year 1706. This lease reserved a rent of £20, and a fine of £10 was payable on the fall of each life. The plaintiff has established a clear title to the relief he seeks, unless it has been defeated by the defence relied on. His title to one-third of the premises in the lease of 1706 (save eight acres, which are not in controversy) is clearly established; it is derived under a deed executed in the year 1780 by Eleanor Keffe, in whom this third of the premises had previously become vested. The defence is confined to a third part of the premises, which was comprised in a lease executed in the year 1723, by the then owners of the lease of 1706, to one Harrison, for 400 years, at an acreable rent, since ascertained to be £43 per annum; it does not extend to or controvert the right of the petitioners to the relief they seek, as far as relates to a third part of a portion of the lands that were not included in the lease of 1723, and were not part of the eight acres. The defence is substantially two-fold, first, that of an adverse title followed by possession; and secondly, of possession of itself constituting the bar of the Statute of Limita-

April 24.  
Judgment.

(a) 12 Ves. 239.

(b) 3 T. R. 159.

(c) 11 East, 280.

\* The Right Hon. FRANCIS BLACKBURNE.

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*Chancery.*  
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tions: in both these cases the possession insisted on is that of the retention and non-payment of rent. In reference to both, it is material, in the first instance, to ascertain precisely the titles of the several parties, and the relations in which they stood to each other.

The plaintiff has, as I have said, deduced a clear title to one-third of the disputed portion—that is, to one-third of the reversion expectant on the lease of 1723, and of course to one-third of the rent of £43, reserved by that lease. The other two-thirds of the same reversion vested in Crawford and Richard Purcell, who were plaintiffs in the suit I have mentioned, of the decree in which the plaintiff claims the benefit. In the year 1847, Crawford Purcell's one-third vested in the defendant, so that the plaintiff, Richard Purcell, and the defendant Woodley, are each entitled to one-third of the premises in the lease of 1706, and of course to one-third of the rent reserved by the lease of 1723. In 1822, the defendant became assignee of the lease of 1723, and at that time the two Purcells had two-thirds, and the persons under whom the plaintiff derives, one-third, of the reversion of the premises demised by it. After 1822, and I believe sometime in or before 1832, Woodley dealt with Lord Gort, the assignee of the estate of the lessors in the lease of 1706, and finally became and now is seised in fee of the premises demised by that lease, in which capacity it was decreed at the suit of the two Purcells that he should execute a renewal of that lease. Thus it will be seen that the defendant's first dealing with this property was in 1822, when he became assignee of the lease of 1723; his next was in or about 1832, when he bought the fee from Lord Gort; and the last in 1847, when he purchased Crawford Purcell's one-third of the premises comprised in the lease of 1706, save the eight acres. He therefore was and is owner in fee of the whole, immediate tenant to the owner of the fee of one-third of the premises under the lease of 1706, and bound to pay one-third of the rent reserved by it: and lastly, he was assignee of the lease of 1723, and bound to pay two-thirds of the rent, and entitled to retain one-third of the rent reserved by it, and to pay and keep down one-third of the head-rent.

These being the titles of the plaintiff and defendant, let me now inquire into the impeachment of the plaintiff's title. It is this:—that Eleanor Keeffe and her husband, in 1779, contracted to sell their third of the premises in the lease of 1723, to a person named Woodley, who was then assignee of that lease, and that Woodley thenceforward retained the one-third of the rent. This title of Woodley, though but equitable, he insists is a better title than that which Eleanor Keeffe afterwards, in 1780, by a regular conveyance duly registered, conveyed to Connor, under whom the plaintiff derives. To this it is replied, and I think justly, that the contract of Keeffe and wife, in 1779, did not bind her, the uses of the fine theretofore levied not enabling him and her then to bind her estate; and further, that in the absence of any evidence to show whether Woodley retained or paid the one-third of the rent, the presumption is, that he paid it to the persons entitled under the deed of 1780, because he was legally liable to do so. But what seems to me to afford a further and complete answer to this argument is, that the defendant derives no right or title from the person who is said to have in 1779 bought Keeffe and wife's third, and to have retained this rent; that in fact he does not attempt to show title in himself, but title in another, who makes no claim under the articles of 1779, and is not shown to have ever done a single act in assertion of his title. This defence is in the nature of a nonsuit: it is, "I have myself no title, but a third party has;" and when we ask how he acquired it, he answers, "there is a receipt from which a contract may be presumed; and when this is shown, there arises a presumption (not, as I must observe, sustained by a single fact proved) that there was possession under it by the retention of the rent;" and a Court of Justice is asked to perform this double operation in order to defeat a clear title under the deed of conveyance executed in 1780, by Eleanor Keeffe, who had then indisputably full legal power to create that title.

But the difficulty of making these presumptions becomes insuperable, when we look to the deed of 1822, which is an assignment of the lease of 1723, which was vested in Woodley in

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*Chancery.*  
HAYES  
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WOODLEY.  
*Judgment.*

1852.  
*Chancery.* -  
 HAYES  
 v.  
 WOODLEY.  
 Judgment.

1799, when he is contended to have bought a third of the reversion. Now suppose he did buy it, one or other of two consequences must follow, either that one-third of the rent of £43 was extinguished, as Mr. *Berkely* contended is to be presumed, or that it was preserved by some mode of conveyance, and was vested in 1822 in some third party. The impossibility of the latter presumption I think I have demonstrated, and we cannot make the former, that the rent was in part extinguished, when the defendant has taken an assignment by deed of the lease of 1723, subject to the payment of the whole rent reserved by it. After this, how can we say that one-third of that rent had been extinguished in 1779?

Having arrived at the end of the first stage of this title, and having shown that, for the reasons I have stated, the third of the rent in dispute was not extinguished or vested in any third person, but was then payable to those under whom the plaintiff derives, I shall next consider the question whether, after this, and during the interval of more than 20 years, which elapsed before the plaintiff asserted his title, they are barred by the Statute of Limitations. In considering this question, I look at the actual rights of the parties as this Court regards them; but it will be seen that the view of the case that occurs to me would be justified by their relative positions and obligations in a Court of Law.

First then, look at the period which begins in 1822, and ends when Lord Gort conveyed the fee to Woodley. During this period Woodley was an undertenant in the occupation of the land; he was bound to pay £43 to the persons who were entitled, as I have shown, to the reversion, that is, to the assignees of the lease of 1706, but he pays none of them; and the mere retention of the rent, during this period, would, according to *Grant v. Ellis*, afford no ground for the bar of the statute. But, does he in fact retain his rent? No, he pays the head rent. For whom, and on whose account does he do so? Plainly, for and on account of his own landlords, the intermediate reversioners, whose right he, by deed in 1822, expressly recognised, and between whom and himself, as assignee of the lease of 1723, there was complete privity of estate; so that these acts, these very payments, were made on behalf and

in discharge of the legal obligations, and to preserve the estates of the very persons to whom he contends his possession was adverse. I observe that the receipts taken from Lord Gort are not produced; if they were, I doubt not they would be, as they ought, receipts to the representatives of the lessee in the lease of 1706. Now if we regard the consequences of this doctrine, contended for by the defendant, I need not say how alarming it is, in a country where sub-tenures are so general; but I have no idea that an occupying tenant, liable to pay a rent-service, can be allowed to avail himself of the Statute of Limitations, because he has only paid so much of his rent as keeps down the head rent.

I now come to the second of the periods in which the defendant himself was owner of the fee; and this requires no detail of observation. It only illustrates more strongly the mischief and injustice to which the positions contended for would tend. In this period Woodley is occupying tenant and head landlord; and having thus acquired the power, as he conceives, of appropriating the rent payable by himself, he says, I will retain so much to pay the head rent to myself; I will not pay the portion that belongs to my landlord, and thus, by this dishonest shuffle, defraud the person whose title it is my duty to regard and to protect.

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1852.  
*Chancery.*  
HAYES  
v.  
WOODLEY.  
*Judgment.*

1853.  
*Privy Council.*

In the Matter of  
The Estate of ARTHUR SAMUEL JUDGE, a Minor, and  
WILLIAM DESPARD, *Owners* ;  
Ex parte WILLIAM BEERE FOX, *Petitioner*.\*

(*Judicial Committee of the Privy Council.*†)

March 31.  
Nov. 14.

Neither the suing out of an *elegit* nor the appointment of a receiver on a judgment not redocketed or revived as required by the 9th G. 4, c. 35, will render it valid against a subsequent purchaser for valuable consideration.

THIS was a petition of appeal from an order of the Commissioners for the Sale of Incumbered Estates, bearing date the 8th of December 1852.

The petition stated the following facts:—In 1810 Arthur Judge was seised in fee of Ballysheil and other lands in the King's County; a judgment was entered up for £3000 penal sum against Arthur Judge, as of Trinity Term 1810, by Joseph Allen, which judgment was assigned to Joseph Knight Carey and Henry Rose, on the 19th of April 1817. That judgment was not revived or redocketed until the 30th of October 1844. By deed, bearing date the 9th of August 1814, Arthur Judge, for valuable consideration, covenanted with Joseph Allen and his heirs that he would, before the 1st of November then next, convey the said lands to two trustees, to the use of himself for life, remainder to his first and other sons in tail, with a general power to him to charge £3000. In 1837, Arthur Judge became insolvent, and in November 1838, B. D. Keane was appointed his assignee. The life estate of Arthur Judge and the charge were sold and conveyed to William Despard, who, on the 8th of May 1844, conveyed them for value to the petitioner W. B. Fox. The petition was filed to raise the charge of £3000.

In 1821, Joseph Knight Carey and Henry Rose sued out an *elegit* on foot of the judgment of 1810, and obtained a finding

\* Reported by E. S. TREVOR, Esq.

† Before the LORD CHANCELLOR; the LORD CHIEF JUSTICE of the Queen's Bench; Mr. Justice PERRIN; Mr. Justice BALL; Baron GREENE; the Right Hon. FRANCIS BLACKBURNE; the Right Hon. JOSEPH NAPIER, and the Right Hon. JOHN HATCHELL.

against the said lands. Arthur Judge filed a bill in the Court of Exchequer to restrain the proceedings at law on foot of the said judgment; and on the 19th of April 1826, an order was made on consent, directing that a receiver should be appointed to receive a moiety of the rents.

1853.  
*Privy Council*  
*In re*  
JUDGE.  
*Statement.*

By an order by the Commissioners for Sale of Incumbered Estates, bearing date the 24th of June 1850, the said lands were ordered to be sold, and on the 11th of July 1852, the petitioner was declared the purchaser for £4750. In the schedule of incumbrances, the charge of £3000, created by the deed of 1814, was placed in priority to the judgment of 1810. An objection was taken to the schedule, which was overruled by Mr. Commissioner Hargreave, whose ruling was rescinded by the full Court, by the order of the 8th of December 1852, whereby it was ordered that the judgment of 1810 should be paid in priority to the charge of 1814.

The petition was presented by W. B. Fox, and submitted that he was entitled to have the charge of £3000 paid in priority to the judgment, inasmuch as the said judgment was not revived or redocketed, in pursuance of the 9 G. 4, c. 35, and prayed that the order of the 8th of December 1852 might be reversed.

Mr. *F. Fitzgerald* and Mr. *Molyneux*, in support of the appeal, argued that the suing out of the elegit, or the appointment of the receiver, had not the effect of preventing the operation of the Redocketing Act. The Court could not insert into the statute a saving which the Legislature had not inserted into it, and they relied on *Ryan v. Cambie* (a); *Joyce v. Joyce* (b); *Beere v. Head* (c); *Hickson v. Collis* (d).

*Argument.*

Mr. *Rollestone* and Mr. *Robert Longfield*, for the judgment creditor, argued that by the elegit he had obtained an estate, and therefore he did not fall within the words of the Redocketing Act, as he was not within the mischief intended to be remedied by it, viz., to guard

(a) 9 Ir. Eq. Rep. 378.

(b) 10 Ir. Eq. Rep. 128.

(c) 3 Jo. & Lat. 340; S. C. 9 Ir. Eq. Rep. 76.

(d) 16 Ir. Eq. Rep. 554; S. C. 1 Jo. & Lat. 94; S. C., Re-h. 10 Ir. Eq. Rep. 447.

1853.  
*Privy Council.*  
*In re*  
 JUDGE.  
 ———  
*Argument.*

purchasers against secret judgments. The appointment of the receiver being equivalent to an equitable execution, they contended, was of itself sufficient to take the case out of the statute, and they relied on the following decisions on the statute against fraudulent conveyances: 27 *Eliz.* c. 13 (*Eng.*); 10 *Car.* 1, sess. 2, c. 3 (*Ir.*), and the Registry Act 6 *Anne* c. 2, which were passed with the same object as the Redocketing Act: *Ash v. Lower* (a); *M<sup>c</sup>Clintock v. Ash* (b); *Gardiner v. Blesinton* (c); *Malcolm v. Charlesworth* (d); *Whitworth v. Gaugain* (e).

Nov. 14.  
*Judgment.*

THE LORD CHANCELLOR.

There has been some difference between the Members of the Council in this case; but the majority of the Council are of opinion that the order of the Commissioners should be reversed, and that priority should be given to the charge over the judgment. It seems hard that a creditor who went into possession under an elegit, so long ago as 1826, should now be disturbed, because he has omitted to comply with the Redocketing Act, which in terms speaks only of judgments, without referring to cases where an elegit or an execution has been sued out on them. But the words of the Act apply to all judgments; and the question which we have had to consider is, whether an elegit can have any force or validity after the judgment on which it was sued has become null and void? We are of opinion that it cannot. The validity of the elegit depends on the validity of the judgment. If the purchaser were in possession, and the elegit creditor were to bring an ejectment, his first step at the trial must be to prove his judgment. The elegit creditor must do the same if he were in possession, and the ejectment was brought against him. If the judgment be null and void as against a purchaser, the foundation of the elegit creditor's title fails. The estate by elegit cannot be considered as conferring a title independent of the judgment. The order of the Commissioners must therefore be reversed.

(a) 1 Law Rec., N. S., 148.

(b) 2 Law Rec., N. S., 45.

(c) 1 Ir. Chan. Rep. 64, 79.

(d) 1 Keen, 63.

(e) Cr. & Ph. 336.

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WALLER v. WILDRIDGE.

(In the Rolls.)

July 13, 14.  
Nov. 8, 14.

THE questions in this case arose on objections to the Master's report under an order of the 13th of November 1852, by which it was referred to him to inquire and report who were the person or persons entitled to the remainder of a certain sum of £1637. 2s. 3d., on which several persons had obtained charging orders. The priorities as found by the Master, and the facts on which the report was founded, are stated in the judgment of the MASTER OF THE ROLLS.

A stop order gives no priority to the party who has obtained it, unless it is lodged with the Accountant-General, the lodgment being equivalent to notice to the trustee of the fund, or the debtor.

A bill for an injunction was filed by W. in the cause of W. v. S., to restrain S. from suing at law on certain bills of exchange: notice of a motion to give security for costs was served, pending which W. obtained a decree *pro confesso*, whereby it was referred to the Master to take an account of the money *bona fide* advanced by S. to W., who undertook to pay any balance which should be found due by him on the account. An order was afterwards made, on consent, that the decree and injunction should be set aside, S. undertaking to file his answer within a month; and that he should have a lien on the funds reported or decreed in the cause of W. v. M'K., and if the answer was not filed within a month, that the decree and injunction should remain in force. Afterwards E. obtained an order in the cause of W. v. M'K., that the same funds should be charged with a sum in favour of E., and that when the funds should be allocated, he should be at liberty to file a charge, and be reported the said sum.

Mr. S. B. Miller, for the plaintiff.

Mr. W. Smith, for Riddick.

Mr. Deasy and Mr. Drury, for Sweetman.

Mr. Molyneux and Mr. Maley, for the assignee of Sweetman.

Mr. Lefroy, for Thomas.

Upon the question as to the necessity of lodging a stop order with the Accountant-General, the following cases were cited:—

*Brearclyft v. Dorrington* (a); *Meux v. Bell* (b); *Greening v. Beckford* (c); *Swayne v. Swayne* (d); *Day v. Croft* (e); *Wood v. Vincent* (f); 2 *Spence Eq. Jur.*, p. 856; *Dan. Chan. Prac.*, p. 1559; 1 *Smith's Chan. Prac.*, p. 747.

count of the money *bona fide* advanced by S. to W., who undertook to pay any balance which should be found due by him on the account. An order was afterwards made, on consent, that the decree and injunction should be set aside, S. undertaking to file his answer within a month; and that he should have a lien on the funds reported or decreed in the cause of W. v. M'K., and if the answer was not filed within a month, that the decree and injunction should remain in force. Afterwards E. obtained an order in the cause of W. v. M'K., that the same funds should be charged with a sum in favour of E., and that when the funds should be allocated, he should be at liberty to file a charge, and be reported the said sum.

*Held*, that S. had acquired a lien on the funds for any demand for costs, or otherwise, which he should establish his right to in the suit of W. v. S.; and that he had priority over E., neither party having lodged his order with the Accountant-General.

(a) 4 De G. & Sm. 122.

(b) 1 Hare, 73.

(c) 5 Sim. 195.

(d) 11 Beav. 463.

(e) 4 Beav. 34.

(f) 4 Beav. 419.

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 Judgment.

The MASTER OF THE ROLLS.

In this case a motion has been made on the part of the Rev. Joseph Neville Houghton, and Thomas Benjamin Wallack Elliott, that the report of the Master under the order of reference of the 13th of November 1852 be varied, on the grounds stated in the notice.

A notice has also been served for the same purpose, on the part of Mr. Riddick, which latter notice complains of the Master's report, on the same grounds, and also on some additional grounds to which I shall hereafter advert.

On the 13th of November 1852, an order was made in this Court, by which it was referred to the Master to inquire and report who were the person or persons properly entitled to the remainder of a certain sum of £1637. 2s. 3d., after deducting certain small sums in the order mentioned; and it was further ordered that several persons who had obtained charging orders in the cause of *Wildridge v. M'Kane*, and whose rights were saved by the order of the 21st of June 1852, made in said cause of *Wildridge v. M'Kane*, and other causes, should have notice of the proceedings on such reference.

The Master made his report under the said order, on the 13th of June 1853, whereby he found, amongst other things, that Robert Sweetman obtained an order in the cause of *Wildridge v. Sweetman*, bearing date the 1st of February 1845, whereby he has a lien on the funds reported or decreed to the plaintiff in the cause of *Wildridge v. M'Kane*.

An objection was taken to that finding by the parties who have served notices to vary the report (which is the first objection), and it is thereby stated that the Master should not have so found, but should have found that the said Robert Sweetman had not any lien on the said funds under said order; or, at all events, that said Robert Sweetman has not any further or other lien than for the costs of the plaintiff in *Wildridge v. Sweetman*.

I presume that that is a clerical mistake in the objection, and that it should be the costs of the defendant in *Wildridge v. Sweetman*.

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*Judgment.*

The Master also found by his report that the said Robert Sweetman is properly entitled in priority, as of the 1st of February 1845, to the sum of £650. 7s. 1d., with interest at £5 per cent. from the 25th of November 1848.

That finding is also objected to; and it is insisted by the second objection that the said Robert Sweetman is only entitled to priority as of the 25th of November 1848.

The third schedule to the Master's report gives priority to the demands of Robert Sweetman over the demands of the parties who have objected to the report, and who have moved to vary it; and it is insisted by the third objection that the demands of the parties on whose behalf the motions have been made have priority over the demands of Robert Sweetman.

The facts which give rise to the objections which I have stated appear to be these:—

On the 30th of January 1845, a consent was signed in a certain cause, in which the defendant, Robert Houghton Thomas Wildridge was plaintiff, and the said Robert Sweetman was defendant, by Mr. John Riddick, as solicitor for R. H. T. Wildridge, and by Mr. Berford, as solicitor for Robert Sweetman, by which it was consented and agreed, by and between the parties thereto, that the decree and injunction pronounced and obtained in the said cause of *Wildridge v. Sweetman*, on the 23rd of January 1845, should be set aside and vacated, at the costs of the plaintiff Wildridge, the defendant Robert Sweetman undertaking to file his answer within one month from the date of the said consent; "and that the defendant do have a lien on the funds reported or decreed to the said plaintiff Wildridge, in the cause of *Wildridge v. McKane*;" and it was further provided by the said consent, that if the said answer should not be filed within the period of one month, that the said decree and injunction should remain in full force, and not otherwise; and that no application to draw money out of said fund should be made without notice to the solicitor for the defendant Robert Sweetman.

That consent was made a rule of Court, in its exact terms, by the late Master of the Rolls, on the 1st of February 1845.

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The first question which arises is—what was the meaning of the words in the consent and order—"That the defendant (Robert Sweetman) do have a lien on the funds reported or decreed to the plaintiff in the cause of *Wildridge v. M'Kane*?"

The present defendant, R. H. T. Wildridge, was plaintiff both in the suit in which the consent was entered into, and in the suit of *Wildridge v. M'Kane*. On the part of Robert Sweetman, it is insisted that the words I have read gave him a lien on the funds in *Wildridge v. M'Kane*, not only for his costs as defendant in the suit of *Wildridge v. Sweetman*, but for the demand, if any, which he should establish in such suit as against the plaintiff; and the Master has, in effect, so found. The parties on whose behalf the motion to vary the report has been made insist that the consent and the order thereon only gave a lien on the funds in *Wildridge v. M'Kane* for the costs of Robert Sweetman as defendant in *Wildridge v. Sweetman*.

I must say that it is very inexcusable that the two solicitors in *Wildridge v. Sweetman* should have drawn up the consent in such a form, without specifying what the lien was to be for, involving their clients in the expense, and the Court in the difficulty of deciding the question as to the construction of this ill-drawn and obscure document. The affidavits of the two solicitors entirely conflict as to what was the intention. I cannot, of course, upon legal principles, construe the order or consent by the statements in the affidavits; but I apprehend that I am at liberty to look to the nature and position of the suit of *Wildridge v. Sweetman* at the time the consent was entered into.

The bill in the case of *Wildridge v. Sweetman* was filed for an injunction to restrain Robert Sweetman from proceeding at law against Wildridge for the recovery of certain bills of exchange, of which Wildridge was the acceptor. It appears that on the 22nd of January 1845, a notice of motion was served, in the said suit of *Wildridge v. Sweetman*, on the part of Robert Sweetman the defendant in said suit, that Wildridge should be restrained from further proceeding in the cause until he should have given security for costs. On the following day, the 23rd of January 1845, Wil-

Wildridge's solicitor, regardless of the pending notice, obtained a decree *pro confesso* against Sweetman, and an injunction against his proceeding at law on foot of said bills of exchange. The form of that decree, which was in accordance with the prayer of the bill in *Wildridge v. Sweetman*, and which is entered in the Rolls Order-book, is of importance.

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It was thereby amongst other matters referred to the Master to take an account of the money, goods or other value *bona fide* advanced and given by Robert Sweetman from the time the bill transactions commenced, and that the plaintiff Wildridge might have all just credits, he offering and undertaking to pay the balance, and an injunction against proceeding on foot of the bills was awarded. Under this decree, and the undertaking of Wildridge, the defendant Sweetman, in the event of the Master ascertaining a balance to be due to him, would have been entitled to relief against Wildridge, and to an order for payment of such balance.

By the consent order of the 1st of February 1845, the decree of the 23rd of January was no doubt set aside; but if the answer of Robert Sweetman was not filed within one month, the decree and injunction were to remain in force. The defendant Robert Sweetman was, however, to "have a lien on the funds reported or decreed to the plaintiff (Wildridge) in the cause of *Wildridge v. M'Kane*." The question is, what was to be the extent of Robert Sweetman's lien?

The extent of the lien which Robert Sweetman was to have on the funds in *Wildridge v. M'Kane* is not limited; and I think that the reasonable construction to be put on the consent and order was that put upon it by the Master, viz., that Sweetman was to have a lien on the funds which Wildridge should be reported or decreed entitled to in *Wildridge v. M'Kane*, for any demand for costs or otherwise which Sweetman should establish his right to in the suit of *Wildridge v. Sweetman*. The question, however, then arises, as to whether the Master was right in estimating the amount of that claim of Robert Sweetman at £650. 7s. 1d., with interest at £5 per cent. from the 25th of November 1848.

The Master found that sum to be due from Wildridge to Robert

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Sweetman, on the order of the 25th of November 1848, making a consent entered into between Sweetman and Wildridge, on the 22nd of November 1848, in the cause of *Wildridge v. Sweetman*, and *Wildridge v. McKane* and other causes, a rule of Court. It was thereby consented that Robert Sweetman should be declared entitled to the sum of £650. 7s. 1d., with interest until paid, together with the costs of the suit of *Wildridge v. Sweetman*. And it was further consented thereby that the said sum of £650. 7s. 1d., with interest, together with the costs of the said suit, should, in pursuance of the order of the 5th of May 1845, be declared a lien on any fund in Court to which Wildridge should be decreed entitled. The reference to an order of the 5th of May 1845 was of course a clerical mistake, as the order which gave the lien was the order of the 1st of February 1845.

Counsel for Mr. Riddick and Counsel for Mr. Elliott insist that such order cannot affect them—the order under which the former claims bearing date the 7th of June 1845, and the order under which the latter claims bearing date the 30th day of January 1846; and it is suggested that Wildridge was an embarrassed man, and was induced to enter into the consent of November 1848 for some small sum of money—that it was a collusive consent, and cannot affect either Mr. Riddick or Mr. Elliott.

There is some doubt whether this point is properly raised by the objections, or was brought under the Master's notice. However, I should not wish to conclude the parties who have taken the objections as to the amount thus ascertained; and if they so require, I shall refer it back to the Master to re-consider the question, whether the sum of £650. 7s. 1d. in said consent order of November 1848, or any other and what sum was due by the said Wildridge to Robert Sweetman on foot of the securities in said suit mentioned.

I have not observed on the proceedings in *Wildridge v. Woodlock*, or on the affidavits of Mr. Riddick and Mr. Berford, as it appears to me that they are not evidence on which the Court can legally act.

I may, however, observe that the difference of the frame of the suit in *Wildridge v. Woodlock*, and the frame of the suit and relief

prayed in *Wildridge v. Sweetman*, might account for the difference between the orders in both cases.

The next question which arises is between Mr. Riddick and Mr. Elliott, and is raised by the fourth and fifth objections of Mr. Riddick.

On the 26th of May 1845, a consent was entered into between the Rev. Joseph N. H. Thomas and Mr. Wildridge, which was made a rule of Court on the 7th of June 1845, by which it was agreed that the funds in the cause of *Wildridge v. M'Kane*, and *The Commissioners of Charitable Bequests v. M'Kane*, which Mr. Wildridge was or should become entitled to, should stand charged with the payment of the sum of £1202. 1s. 11d., with interest, in favour of the Rev. Joseph N. H. Thomas, being the amount due to said Thomas on foot of a judgment obtained by him against Wildridge in Hilary Term 1845, for £2400.

Mr. Elliott claims under a consent order in the same two causes, dated 30th January 1846, by which Wildridge charged the funds to which he was or should be entitled in said causes with the sum of £147. 1s. 11d. in favour of said Mr. Elliott.

Mr. Elliott of course admits that his claim is subject to any demand of Mr. Thomas, under the previous order of the 7th of June 1845.

Mr. Thomas has proved for only £280. 5s. principal, and interest thereon, making together £402. 12s. 4d. Mr. Riddick claims under a deed of the 21st of February 1846 (subsequent in date to the order under which Mr. Elliott claims), and by that deed Mr. Thomas assigned all benefit and advantage which he had under the charging order of the 7th June 1845, and the judgment therein mentioned, to one Thomas Davis, on trust, amongst other matters to pay said Mr. Thomas £280. 5s., therein recited to have been advanced by said Thomas for Wildridge, with interest at £6 per cent., and in the next place to pay Mr. Riddick and Mr. Tilly their costs now due and incurred on behalf of the said Wildridge, or which should thereafter be incurred; and then follow some other trusts not material to the question.

Mr. Riddick's Counsel insists that although Mr. Thomas has proved only for £402. 12s. 4d., yet that he had in fact other claims

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on foot of the judgment in the charging order of the 7th of June 1845 mentioned, and that as his said charging order was for the amount of £1200, Riddick has a right, under the trusts of the deed of February 1846, to stand in the shoes of Thomas for any claim which Thomas had against Wildridge on foot of said charging order of the 7th of June 1845, and the judgment therein mentioned.

This is all true; but the difficulty in the case is that it does not appear what were the extent of Thomas's rights under the charging order of the 7th of June 1845, and the judgment therein mentioned, at the date of the order obtained by Elliott, on the 30th of January 1846, and at the date of the assignment on the 21st of February 1846.

Now I do not find any evidence to affect Elliott on this subject, as the recitals in the deed of February 1846 are not evidence against him, and there is no evidence as to what was due to Thomas under the charging order of the 7th of June 1845, either in January or February 1846. Thomas has only proved for £402. 12s. 4d., but Riddick says that Thomas's proving only for that sum cannot affect his rights under the deed of February 1846, if more was then due to Thomas.

I think it may be assumed, *prima facie* on the evidence, that nothing was due to Thomas except what he proved, and he could not give more extensive rights by the assignment of February 1846 than he himself had, to the prejudice of Elliott, who claimed under the order of January 1846.

As therefore the facts do not clearly appear, I shall give Mr. Riddick the benefit of a reference back to the Master on this point, and I shall reserve the question of costs.

It is very much to be regretted that it is necessary to refer this case back to the Master, in consequence of the questions not having been satisfactorily raised before him.

I am not at present prepared to differ from the view the Master has taken; but I think it will be safer to have the further facts investigated, which I shall refer it back to the Master to report upon: but if the parties who take this further reference shall fail, I shall probably make them pay the further costs to be incurred thereby.

The next question in this case is a question of priority as between Mr. Elliott and Mr. Sweetman.

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On the 30th of January 1846, the said Mr. Benjamin V. Elliott obtained an order founded on a consent entered into in the causes of *Wildridge v. M'Kane*, and *The Commissioners of Donations v. M'Kane*, between R. H. T. Wildridge and the said B. V. Elliott; and it was accordingly ordered, as between the parties to such consent, that the funds in the said last mentioned causes, or in either of them, to which the said R. H. T. Wildridge should become entitled, should stand charged with the sum of £147. 1s. 11d. with interest at £5 per cent in favour of said B. V. Elliott, on foot of a judgment obtained by him against said Wildridge, and it was further ordered that the said sum, with interest, should be paid to the said B. V. Elliott out of said funds, and that said B. V. Elliott, when the funds should be ordered to be allocated in said causes, or either of them, should be at liberty to file a charge, and be reported said sum out of any funds to which Wildridge should be entitled.

Mr. B. V. Elliott insists by his Counsel that that was a stop order, and that whatever may be the construction of the consent order of the 1st of February 1845 (which it will be recollected was in the cause of *Wildridge v. Sweetman*, and not in the cause of *Wildridge v. M'Kane*, in which cause the fund was realised), the said order obtained by Mr. Elliott in the latter cause gave him priority over Sweetman.

In the case of *Dunster v. Lord Glengall*, decided in May 1853 (a), I had occasion to refer to the authorities bearing on this question, and it is therefore not necessary to go over them again.

It is a general rule that the assignee of a chose in action, assignable by any instrument available only in equity, must be subject to all equities which subsist against the assignor. According, however, to the doctrine of *Dearle v. Hall*, *Loveridge v. Cooper* (b) and *Etty v. Bridges* (c), the assignee of a chose in action, who gives notice to the trustee of the fund, will acquire priority over a prior assignee of

(a) *Ante*, p. 47.

(b) 3 Russ. 1.

(c) 2 Y. & Col., C. C., 486.

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the fund, who has given no notice. The cases were, as I have already stated, considered in *Dunster v. Glengall*.

The principles to which I have referred are, it is said, applicable to stop orders, and that although a party who obtains such order will, according to the general rule, take subject to all equities which subsist against the party whose fund is sought to be affected by such order; yet, if the person who obtains the order lodges it with the Accountant-General, he thereby acquires priority over those who have equitable liens on the fund, the lodging the order with the Accountant-General being, it is said, equivalent to giving notice to the trustee of the fund.

The practice of the Courts of Equity in England on this subject is referred to in Mr. *Daniel's Chancery Practice*, 2nd ed., pp. 1559, 1560, and in Mr. *Smith's Chancery Practice*, vol. 1, p. 747; and it appears that, according to the practice of those Courts, no priority is gained by the order unless it is lodged with the Accountant-General.

It has, however, been contended on the part of Mr. Elliott, that according to the practice in this country, a party who obtains such an order acquires a right to the interest which his debtor had in the fund, discharged of all equities attaching on the fund, although he may not have lodged the order with the Accountant-General.

This question, I may observe, is more a matter of law than a matter of practice.

I have made inquiry from Mr. H. Darley, whether it was ever held in the time of my predecessors that an order had the effect of giving priority without being lodged with the Accountant-General; and he has informed that it never was so held or decided.

Mr. Darley has also made inquiry in the Accountant-General's office; and Mr. Davis, an experienced clerk in that office, has stated that such orders have been occasionally lodged in the office; and that the course he adopted was to place the order in the page of the book in which the account was entered, so that his attention should be called to the existence of the stop

order, if any other order in relation to the fund in Court was made.

It would, no doubt, be more regular if an entry was made on the account of the date of the lodgment of such stop order, as in the event of two orders being lodged, it might become necessary to ascertain, by affidavit, the date of the lodgment of each order in the Accountant-General's office.

No case has arisen at the Rolls, so far as I can ascertain, in which priority has been claimed by reason of a stop order, as against parties who had equitable claims attaching on the fund prior to the order.

In the present case, I am of opinion that as Mr. Elliott did not lodge the order of the 30th of January 1846 with the Accountant-General, he did not by that order acquire a right to the fund which Wildridge might be found entitled to in *Wildridge v. M'Kane*, discharged of the equities which, as against Wildridge himself, undoubtedly attached on the fund.

I stated this opinion shortly when this case was last before the Court; but I have repeated the opinion, as the question was sought to be re-opened.

So far therefore as this question is concerned, I am of opinion that the Master was right in holding that Sweetman had priority over Elliott.

On the other questions in the case, it will be necessary, for the reasons I have stated, to send the case back to the Master.

The following order was made:—

Let the first and third objections taken to the report of Edward Litton, Esq., the Master in this cause, filed the 13th of June 1853, by Mr. John Riddick, and also the first and third objections taken to the said report by the Rev. J. N. H. Thomas and Benjamin Vallack Elliott, be overruled, with costs; and let said John Riddick and the said Rev. T. N. H. Thomas, and Benjamin Vallack Elliott, pay to Mr. Robert Sweetman the costs of opposing the respective motions made by them to vary said report; and let the consideration of the second objection taken by said parties respectively stand over. And Counsel for the said

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John Riddick, and Counsel for the said Messrs. Thomas and Elliott, insisting that the consent order of the 25th of May 1848, in the cause of *Wildridge v. Sweetman*, and other causes, and which bears date subsequent to the orders of the 7th of June 1845, and 30th of January 1846, under which they claim, was not evidence against them, and that even if the order of the 1st of February 1845 gave Robert Sweetman a lien on the funds in *Wildridge v. McKane* for whatever sum should be found due to him in the cause of *Wildridge v. Sweetman*, yet that there was no legal evidence to show that £650. 7s. 1d. was due to Robert Sweetman: It is ordered by the Court, that it be referred back to the Master to re-consider the question, whether the sum of £650. 7s. 1d., in said order of the 25th of November 1848 mentioned, or any other, and what sum was due by the said Wildridge to Robert Sweetman on foot of the securities in the suit of *Wildridge v. Sweetman* mentioned, on said 25th of November 1848; and reserve the question of the costs to be incurred by such reference back to the Master, until he shall have made his further report. And with respect to the fourth and fifth objections taken by Mr. John Riddick, and which raise a question as between him and Messrs. Thomas and Elliott, refer it to the Master to inquire and report whether, at the date of the order of the 30th of January 1846, or at the date of the deed of the 21st of February 1846, there was any further sum, and if so, what further sum due to the said Rev. T. N. H. Thomas, over and above the principal sum of £280. 5s. 0d. with interest thereon; and reserve the question of the costs of the fourth and fifth objections, and also in relation to such reference, and reserve further order until the Master shall have made his report; and let Mr. Tilly be at liberty to appear in the office, and take objections to the report; and let the other motions stand over.

*Rolls Motion Book, 344, fol. 188.*

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MINCHIN v. MINCHIN.

June 2, 3.  
Nov. 3.

THIS was an appeal motion from a decretal order of Master Brooke, to whom the matter had been referred, under the 15th section of the Court of Chancery (Ireland) Regulation Act, 1850. The question was, whether an appointment of two several sums of £4000 and £1000, purported to have been made by the will of Mary Anne Minchin, bearing date the 15th of September 1842, was valid? The instruments creating the power, and the will of M. A. Minchin, are fully stated in his Honor's judgment. The Master declared the appointment good.

Mr. F. Fitzgerald and Mr. S. B. Miller, in support of the appeal motion, argued, that the power was a simple power of distribution, and did not authorise an exclusive appointment either as to the £4000 or £1000: *Reid v. Shergold* (a); and that the appointment was clearly exclusive: *Lloyd v. Laver* (b).

The Attorney-General and Mr. Finch White, contra, admitted that the power did not warrant an exclusive appointment; but they contended that the appointment was not exclusive, as a contingent interest was given to all the sons, which was more beneficial to them than appointing a farthing to them, as the testatrix was authorised by the statute permitting illusory appointments to

A power to appoint to and amongst children, in such shares and proportions, or to appoint a sum "to be divided to and amongst children in such shares," &c., as the donee of the power shall appoint, does not authorise the exclusion of any of the children.

The statute as to illusory appointments (1 W. 4, c. 46) made the appointment of a nominal or illusory share, which was a valid appointment at law, valid in equity, but it did not make that which was an invalid appointment, both at law and in equity, because some of the objects of the power were excluded, valid in equity.

Therefore an appointment—under a power which does not warrant the exclusion of any of the objects of it—to some of them, and if they should die under age, and without issue, to the others, is invalid.

A fund was, by a marriage settlement, directed to be divided among children, as the husband and wife, or survivor of them should, by any deed or writing, or by his or her last will and testament limit and appoint. The wife made an appointment by her will, which was written by the husband himself, and proved by him after her death.

Held—that the will was inoperative, either as a joint appointment, or an appointment by the survivor.

(a) 10 Ves. 370.

(b) 14 Sim. 645.

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have done. They also contended that the will was operative as a joint appointment by the husband and wife, having been written by the husband and signed by the wife, or as an appointment by the survivor, who proved the will, and thus made it his own act. They cited *Page v. Leapingwell* (a); *Limbard v. Grote* (b); *White v. Wilson* (c); *Laurie v. Clutton* (d); *Doe v. Cavendish* (e); *Crozier v. Crozier* (f); 1 *Sug. on Powers*, p. 572, 6th ed.; *Buxton v. Buxton* (g); *Saunders v. Owen* (h); *The Countess of Sutherland v. The Duke of Northumberland* (i); *Chester v. Chadwick* (k); *Wilson v. Piggot* (l); *Vane v. Lord Dungannon* (m); *Scott v. Salmond* (n).

Mr. *W. Smith*, for Mrs. E. L. Stony, cited 1 *Sug. on Powers*, p. 245; *Wilson v. Piggot* (o).

Nov. 3.  
*Judgment.*

#### THE MASTER OF THE ROLLS.

In this case a motion has been made on behalf of Corker Wright Minchin, and John Minchin, who are adult, and on behalf of their minor brothers, Frederick Nicholson Minchin and Charles Minchin, by their guardian *ad litem*, that the decretal order of William Brooke, Esq., the Master in this matter, of the 23rd of May 1853, may be varied, in so far as the same declares that the two sums of £4000 and £1000, late currency, in the said order mentioned, were well appointed, and were distributable in the manner and to the persons in the second schedule to said order mentioned; and that it should be declared that there has been no valid appointment of the said sums.

The parties on whose behalf the motion has been made are

(a) 18 Ves. 465.

(b) 1 M. & K. 1.

(c) 17 Jur. 15.

(d) 15 Beav. 65.

(e) 4 T. R. 744, n.

(f) 3 Dr. & War. 353; S. C., 5 Ir. Eq. Rep. 540.

(g) 1 Keen, 753.

(h) 2 Salk. 467.

(i) 1 Dick. 56.

(k) 13 Sim. 102.

(l) 2 Ves. jun. 351.

(m) 2 Sch. & Lef. 129.

(n) 1 M. & K. 365.

(o) *Ubi supra*.

four of the children of the petitioner, the Rev. Wm. Minchin, by his wife Mary Anne Minchin, deceased.

On the 15th of July 1852, the usual order of reference was made in this matter by the Lord Chancellor, under the 15th section of the statute, and it was thereby referred to the Master to consider the matter of the petition, and to proceed thereon pursuant to the statute.

The Master, by his decretal order, has declared that the two sums of £4000 and £1000 respectively, late currency, in the petition mentioned, were well appointed, and that by reason thereof, the said sums of £4000 and £1000 became respectively distributable amongst and belong to the persons in the decretal order mentioned, in the shares in the second schedule thereto set forth, subject to the right of the petitioner, to the interest and dividends of the £1000 for his life, and subject, as to the £4000, to a certain claim for costs and maintenance, on which no question has been raised on this appeal.

The decretal order then contains certain directions consequent on the declaration that the two sums of £4000 and £1000 were well appointed.

The object of the present appeal is to establish that the decretal order is wrong in having declared that the said two sums were well appointed, and that, on the contrary, there has been no valid appointment either of the £4000 or the £1000.

The facts of the case appear to be these:—The petitioner, the Rev. Wm. Minchin, was married to Mary Anne Wright, daughter of Corker Wright, on the 28th of May 1816. A postnuptial settlement, bearing date the 10th of October 1817, was made and executed between the said Corker Wright, of the first part, the petitioner and his wife Mary Anne Minchin otherwise Wright, of the second part, and James R. Gray and Simon Pepper, of the third part. It appears, from the recitals in that settlement, that under the provisions of an indenture, bearing date the 9th of February 1787, a sum of £1000 had been assigned to trustees upon certain trusts, and that said sum of £1000 had become vested in said Mary Anne Minchin, subject to the right of her father

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*Rolls.*  
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v.  
MINCHIN.  
*Judgment.*

1853.  
*Rolls.*  
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*Judgment.*

Corker Wright to the interest of said sum during his life; and after such recital, and after reciting the marriage of the petitioner and Mary Anne Minchin, it was, by the said indenture of the 10th of October 1817, witnessed that the said petitioner, the Rev. Wm. Minchin, and Mary Anne Minchin otherwise Wright his wife, granted and assigned to the said James R. Gray and Simon Pepper the said sum of £1000, on trust that they should, immediately after the death of Corker Wright, permit and suffer the said petitioner to take and receive the yearly interest thereof during the term of his natural life; and from and after his decease, to permit and suffer the said Mary Anne Minchin to receive the interest thereof during her natural life; "and after the decease of the said Wm. Minchin and Mary Anne Minchin, that the said sum of £1000 should be divided to and amongst the children of the said Wm. Minchin (the petitioner) and Mary Anne Minchin his wife, in such shares and proportions, and at such time and times as the said Wm. Minchin and Mary Anne Minchin, or the survivor of them, shall by any deed or writing, or by his or her last will and testament, limit or appoint; and for want of such direction, limitation or appointment, the same to be equally divided amongst the said children, share and share alike; and if they have issue but one child only, then same to go to such only child, on his, her or their attaining the age of twenty-one years, or day of marriage, which shall first and next happen after the death of the survivor of them, the said Wm. Minchin and Mary Anne Minchin; and in case the said Wm. Minchin and Mary Anne Minchin should die without issue of their several and respective bodies lawfully begotten, or that such issue shall die under age, unmarried and without issue, that then and in such case the said sum of £1000 shall go to the survivor of them, the said Wm. Minchin and Mary Anne Minchin his wife, and his or her executors, administrators and assigns."

Corker Wright afterwards took up the said sum of £1000 from the trustees, and was, at the time of his death and making of his will, seised and possessed of real and personal estate, and amongst other property, of a certain sum of £5000, and

securities for £474 sterling; and being so seised and possessed, he made his last will and testament, bearing date the 11th of September 1819, and thereby, after several recitals and bequests, gave, devised and bequeathed the said sums of £5000 and £474 to trustees upon trust as to £1000, part of the said two sums, to pay and apply the interest thereof to his wife Elizabeth Wright and her assigns, for and during her natural life; and from and after her decease, to pay and apply the interest of said sum of £1000 to his second daughter, the said Máry Anne Minchin, for and during her natural life, for her own sole and exclusive use, &c.; and after the death of his said second daughter, in trust, to dispose of the said sum of £1000 in such manner precisely as was next thereafter mentioned, with respect to the sum of £3000, after the death of his (the said testator's) second daughter, Mary Anne Minchin; and with respect to the said sum of £3000 (other part of said two sums of £5000 and £474), in trust to pay and apply the interest and yearly profits thereof unto his said daughter Mary Anne Minchin, for and during her natural life, for her sole and separate use, &c.; "and after the death of my said daughter, in trust to dispose of the said sum of £3000, and also of the said sum of £1000, amongst her children by her present or any after-taken husband, in such shares and proportions as my said daughter shall, by her last will and testament, direct, limit and appoint; and in case of no appointment by her, in trust to dispose of the same amongst all and every such child and children, share and share alike; the share and shares of such of them as shall be a son or sons to be vested on his or their attaining twenty-one years, and the share and shares of such of them as shall be a daughter or daughters, on her or their attaining such age of twenty-one years or day or days of marriage, whichever shall first happen, with benefit of survivorship amongst the survivors of such children as to the share and shares of such of said child or children who shall die before his or her portions thereof shall become vested as aforesaid, and any interest thereof which shall be unapplied as hereinafter mentioned; and in trust to apply the interest of the several shares

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*Judgment.*

of said sums of £3000 and £1000, towards the maintenance, education and support of the said children, until their several portions thereof shall severally become vested as aforesaid : and if there shall be any one such child who shall attain such age of twenty-one years, being a son, or such age of twenty-one years or day of marriage, being a daughter, in trust for such only child, as soon as he or she shall all attain, if a son such age of twenty-one years, or if a daughter attain such age or be married, his or her executors, administrators or assigns."

The will then contains some bequests over, in events which have not happened. The will of Corker Wright then contains the following provision as to the further sum of £1000, which had been settled by the marriage settlement of the 10th of October 1817, and which the said Corker Wright had taken up from James R. Gray and Simon Pepper, the trustees in the said settlement;—"And as to, for and concerning the sum of £1000, other part of said two sums (of £5000 and £474) I do hereby declare the same to be vested in the said Maunsel Andrews and James R. Gray (the trustees in his will), their executors and administrators, in trust, and for the purposes mentioned in the marriage settlement of my daughter Mary Anne Minchin, bearing date the 10th day of October 1817, with respect to a sum of £1000 thereof vested in the said James R. Gray and Simon Pepper, I, having taken up the said sum of £1000 so vested in them, and having held the same, and now bequeathing the sum of £1000 to the said James R. Gray and Maunsel Andrews, to the same uses as those declared in the said settlement, in lieu of the sum of £1000 so vested in the said James R. Gray and Simon Pepper, I having got possession of the same, but hereby meaning and intending that there should not be two sums of £1000 applicable to the uses of the said settlement, but only the said sum of £1000, part of the said sums of £5000, and £474 hereinbefore bequeathed, the said last mentioned sum of £1000 being hereby declared by me to be the sum mentioned in the said settlement of October 1817, and applicable to the uses thereof, and given by this my will to be held to the uses of the said settlement in lieu of the sum of £1000 therein mentioned, whereof I became possessed as aforesaid."

The testator Corker Wright died on the 11th of February 1828, leaving Elizabeth Wright his widow and executrix him surviving, and the said Elizabeth Wright proved the will, and during her life received the interest on the sum of £1000 so bequeathed to her, and died on the 16th of January 1832, and thereupon Mary Anne Minchin, the wife of the petitioner, became entitled to the interest of the said sum of £1000, together with the interest of the said sum of £3000, under the said will of Corker Wright, with the power to appoint said two sums, under the provisions contained in the said will.

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The petition, after stating the facts which I have mentioned, states that the petitioner took out administration *de bonis non* to Corker Wright, and is now his personal representative, and that all the real and personal estate of the said Corker Wright has been fully administered, except the said sum of £5000, which consists of the said sums of £1000, £1000, and £3000.

Mary Anne Minchin, the wife of the petitioner, died on the 23rd of September 1842, but before her death made her will, duly attested, bearing date the 15th September 1842, which recites that she was entitled under the will of her father, the late Corker Wright, Esq., to the sole and exclusive disposal of the sum of £4000, late Irish currency, and then secured by mortgage on the estate of Richard Parsons, Esq., and recites that she was also entitled by her marriage settlement to the disposal, in conjunction with her husband, of the further sum of £1000 of the late currency, and secured as aforesaid; and after such recitals the will proceeds in these words:—

“ Now it is my will, and I do hereby bequeath the sum of £500, British currency, to each and every of my eight daughters, upon their respectively attaining their full age of twenty-one years, or days of marriage, whichever shall first happen; and the residue of the said sum of £5000, to my dearest little boy Tommy, upon his attaining the age of twenty-one years as aforesaid; the interest of the said portions respectively, until payable as aforesaid, to go towards the maintenance, education and clothing of my said children, according as my dear husband shall approve, and whom I appoint, in case he

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shall survive me, executor of this my will: and in case any of my said children shall die before attaining their full age, or days of marriage, as aforesaid, then it is my will that the portions of such child or children so dying shall go and be divided, share and share alike, amongst my other sons, upon their respectively attaining their full ages as aforesaid."

Mary Anne Minchin left sixteen children her surviving, namely, eight daughters and eight sons. The lands on which the £5000 is charged having been sold in the Incumbered Estates Court, the Chief Commissioner ordered that the sum should be retained in Court, with liberty to the petitioners to file a cause petition to have the rights of all parties to the fund ascertained.

The petition states that some of the petitioner's children allege that the appointment of the said sums of £4000 and £1000 is invalid, owing to its being an exclusive appointment amongst nine, whereas each child should have got a part, and that therefore it is equally divisible; while others of the said children (objects of the appointment) assert the appointment to be valid and sustainable in equity.

The petition also states that some of the children also allege that the said appointment, if valid at all, is only valid as to £4000 out of the £5000, the said Mary Anne Minchin having only a sole power of appointment over £4000 of the said sum, and there being no joint appointment of the £1000 settled by the marriage settlement of 1817.

The petition then states that the petitioner claims the yearly interest of £1000, part of the sum of £5000, by virtue of the said settlement, and that he claims the interest of the residue of the fund, under the will of his wife, having expended far more in the maintenance and education of the children.

The petition then states the names of the children who are under age, and that the petitioner is, under the circumstances, and as personal representative of Corker Wright, desirous to have the rights of all parties to said sum of £5000 ascertained, so as to have it disposed of according to the trusts of the the will in relation to the same.

The petition then states that Corker Wright made his wife Elizabeth

residuary legatee, and that the petitioner after her death obtained letters of administration to her; and the petition further states that the petitioner, as administrator of Corker Wright, assents to the said legacy in the will of the said Corker Wright, and is willing that the fund should be distributed according to the rights of the parties.

The petition then prays that the rights of all parties to the said sum of £5000, late currency, may be ascertained, and declared by the Court, the petitioner assenting to the distribution of the same, in such shares, proportions and manner as the Court might direct; or in case it should become necessary, that an account should be taken of the personal estate of Corker Wright, and that the trusts of the will might be carried into execution, the petitioner offering to account for the assets, if required.

I entertain great doubt whether the petition in this case falls within the 15th section of the statute. If it does not, the Master had no jurisdiction to decide the case. However, as the Lord Chancellor held that the case did fall within the 15th section, and referred the matter of the petition to the Master, by the order of the 15th of July 1852, that question was not open in the Master's office, nor is it open to me to consider or decide. The facts all appeared on the face of the petition, and the order of reference by the Lord Chancellor is of course to be considered as a decision that the case fell within the 15th section.

The ruling of the Master, on which the decretal order was made up, bears date the 19th of March 1853, and is as follows:—  
“Declare the two sums of £4000 Irish and £1000 Irish, both well appointed; the former, by the will of Mrs. Minchin, the latter, by the same will, considering it a writing which was written by her husband, and produced by him after her death, for probate, and probate granted to him thereon, whereby it became the appointment by the survivor: and let the costs of all parties come out of those two sums.”

I am unable to concur in the opinion of the Master. First, as to the sum of £4000 in the decretal order mentioned; it consists of the sum of £1000, the interest of which was bequeathed by Corker Wright to his wife Elizabeth, for her life, and of the sum

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*Judgment.*

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*Rolls.*  
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of £3000 in the said will mentioned; and as the only difference between the limitations, as to the said sums of £1000 and £3000 was the life interest of Elizabeth Wright in the former sum, and as she died in 1832, the Master has properly treated the sum as a consolidated sum of £4000, and which consolidated sum, the said Elizabeth being dead, is subject to the same trusts. Corker Wright, by his will, bearing date the 11th of September 1819, bequeathed the interest of £1000, part of said sum of £4000, to his wife Elizabeth for life, and after her death to his daughter Mary Anne Minchin for life, and bequeathed the interest of £3000, another part of the said sum of £4000, to Mary Anne Minchin, for life, and after the death of the said Mary Anne, and the death of the said Elizabeth and Mary Anne, the trustees in the will were "to dispose of the said sum of £3000, and also of the said sum of £1000 amongst her (Mary Anne Minchin's) children, by her present husband, or by any other after-taken husband, in such shares and proportions as my said daughter shall by her last will and testament direct, limit and appoint."

The decision of Lord Alvanley, in *Kemp v. Kemp* (a), in which the previous cases were considered and commented upon, establishes that the power as to the £4000 did not authorise an exclusive appointment. In that case, the will, after bequeathing certain legacies, proceeded as follows:—"What remains after paying those legacies, I give to my cousin Martha Kemp for her life, and then to be disposed of amongst her children as she shall think proper." Lord Alvanley, in giving judgment, said:—"The question then is, whether according to the true construction in law and equity, upon a trust to dispose amongst a certain given assigned number of particular persons, each of those persons is not to be entitled under that; and after looking through every case that was cited, I am bound to declare I find it to be the opinion of a series of Judges, from Lord Nottingham to the present time, that words like these amount to a gift to all the objects, and the exclusion of one is an undue execution."

*Lord St. Leonards*, in his work on *Powers*, states that Lord Alvanley treated the word "amongst" as equivalent to "all and

(a) 5 Ves. 849.

every," which words are mandatory, that each shall have a share. Counsel for the appointee have, however, argued that Mary Anne Minchin by her will (after appointing a portion of the fund amongst her daughters upon their respectively attaining twenty-one, or marriage, whichever should first happen, and after appointing the residue to her son Tommy on his attaining twenty-one) directs that in case any of her children should die before attaining their full age or days of marriage as aforesaid, that in such case the portion of such child or children so dying should go and be divided share and share alike amongst her other sons, upon their respectively attaining their full age as aforesaid; and Counsel for the appointees contend that this contingent bequest satisfies the rule, that a portion of the fund must under such a power as I have stated be appointed to each child.

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It is said that since the statute as to illusory appointments, a farthing might have been appointed to each of the sons excluded from any immediate benefit; and that if so, the contingent bequest to them is more beneficial than the bequest of a nominal sum, and that therefore the appointment is valid. Such an argument, I believe, was never addressed to any Court, up to the present case. The statute made the appointment of a nominal or illusory share, which was a valid appointment at law, also valid in equity; but it did not make that which was an invalid appointment, both at law and in equity, because some of the objects of the power were excluded, valid in equity. The recital in the statute shows what the law was; and it is clear that when the power does not authorise an exclusive appointment, a share, however small, must be appointed to each child. There is no reason stated in the ruling of the Master for his decision as to the £4000, and I have been unable to ascertain what the ground of the decision was. I am not prepared to decide, for the first time, in a case where there cannot be an exclusive appointment, that the appointment of a contingent interest in a fund is a bequest of a share of the fund.

In the case of *Lloyd v. Laver* (a), Sir L. Shadwell, in giving judgment, said:—"If a fund is given in trust for all and every the

(a) 14 Sim. 647.

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child and children of A, who shall be living at the time of her decease, in such parts or shares and in such manner as A shall appoint, can it be said that an appointment of the whole income of the fund to one of the children for life is an appointment of the fund to all the children in shares? I apprehend that no appointment can be a good execution of such a power unless it gives a share of the capital to each of the children, which the appointment in question does not do; therefore, I have not the slightest doubt it is invalid."

It appears to me that the decision of the Master as to the £4000 is inconsistent with the established rule as laid down in the cases I have referred to, and inconsistent with the recital in the statute as to illusory appointments; I must, therefore, set aside the declaration in the decretal order, as far as it relates to the £4000.

The next question which arises is—whether the sum of £1000 in the settlement of the 10th of October 1817 was duly appointed? That sum had been received by Corker Wright, and the effect of his will, so far it relates to the said sum, was simply that it should be repaid out of his assets.

Whether it was duly appointed depends on the terms of the settlement of the 10th of October 1817, and of the instrument of the 15th of September 1842, which purports to be the will of Mary Anne Minchin. By the settlement of 1817, the said sum of £1000 was assigned to trustees on trust, that after the death of Corker Wright, they should permit and suffer the petitioner to receive the interest thereof during his life, and after his death that his wife Mary Anne Minchin might receive the interest thereof during her life, and after their decease "that the said sum of £1000 should be divided to and amongst the children of the said William Minchin (the petitioner) in such shares and proportions and at such time and times as the said William Minchin and Mary Anne Minchin, or the survivor of them, shall, in any deed or writing, or by his or her last will and testament, limit or appoint." I apprehend that the words, "to and amongst," in the said clause, precluded an exclusive appointment. Some of the cases are collected in *Lord St. Leonards' work on Powers*, vol. 1, p. 537, 7th ed.

In *Vanderzee v. Aclom* (a), Lord Alvanley stated:—"It is now

(a) 4 Ves. 784.

perfectly established that wherever a power is given to appoint to and amongst several persons, the power is not well executed unless some part is allotted to each."

In the case of *Young v. Lord Waterpark* (a), the settlement directed that "if there should be two or more younger children, the sum of £10,000 should be paid to and distributed amongst them in such shares as Sir H. C. and Sarah his wife, or the survivor of them, should by deed appoint, or for want of appointment, equally;" and it was decided that those words did not authorise an exclusive appointment.

If this be so, the declaration of the Master, in his decretal order, that the £1000 was well appointed, cannot be sustained. I have not been informed how the Master distinguished this case from the several cases by which the law has been hitherto understood to be settled. The question which appears to have been considered by the Master was, whether the instrument of the 15th of September 1842, purporting to be the will of Mary Anne Minchin, can be considered, under the circumstances of the case, as the joint appointment of the petitioner and of his wife the said Mary Anne, or the separate appointment of him as the survivor? If the settlement of 1817 did not authorise an exclusive appointment, it is not material whether or not the instrument of September 1842 became an appointment of the petitioner as survivor, as stated by the Master in his ruling of the 19th of March 1853. If it were, however, necessary to decide the question, I am of opinion that the instrument of the 15th of September 1842 cannot, under the circumstances, be considered valid, either as a joint appointment by the petitioner or his said wife, or as an appointment by the petitioner as the survivor.

The instrument of the 15th of September 1842 was the will of Mary Anne Minchin. It was a revocable document, and could only take effect upon her decease. It is alleged to have been in the handwriting of the petitioner. I am not aware of any evidence of this; but the allegation is not disputed. Supposing it to be in the handwriting of the petitioner, it could not operate as the joint appointment of the petitioner and his wife, because the instrument purports to be the will of the wife; and if it were considered to be a

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(a) 13 Sim. 202.

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 Judgment.

"writing" by the petitioner, within the meaning of the settlement, it would be revocable as to the one, and not as to the other. It would, I apprehend, be impossible to uphold it as a joint appointment; \* as if it were so, it would take effect as to the wife after her death, and be revocable during her life: as to the husband, it would take effect immediately, and be irrevocable. The wife had no separate power of appointment under the settlement of 1817, except in the event, which did not take place, of her surviving her husband.

The question, therefore, is—whether the instrument of the 15th of September 1842 could be sustained as a "writing" executed by the petitioner as the survivor? No doubt, the petitioner proved the will of his wife Mary Anne Minchin; but he only thereby expressed his assent to the instrument as her will, but did not establish the instrument as his act. As her will, it had no operation as to the £1000, because she had no separate power of appointment, unless she survived the petitioner, an event which did not occur.

The instrument is sought to be sustained as an execution of the power, by the petitioner, on the ground that it was in his handwriting, and that by taking out probate of the instrument he adopted it, and that by the event of his having survived, it has become operative. The case relied on is *The Countess of Sutherland v. Northmore* (a). That case appears to be an authority that where a power is authorised to be executed in a contingent event, it may be executed before the happening of the contingency. I do not, however, consider that the fact of the petitioner having drawn up the will of his wife in his own handwriting can make it a separate appointment by him, or that the drawing up of an instrument purporting to be the will of his wife can be considered as the execution of the separate power which he had in the event of his surviving her.

It was decided by Lord Thurlow, in the case of *M'Adam v. Logan* (b), that where a power was given to the survivor of two persons, and they executed a joint appointment, it was bad.

\* *Vide Burnet v. Mann* (1 Ves. 187); *Lisle v. Lisle* (1 Br. C. C. 533); *Hatcher v. Curtis* (2 Freem. 61.)

(a) 1 Dick. 56.

(b) 3 Br. C. C. 310.

In the case of *Hole v. Escott* (a), where the husband and wife had a joint power of appointment, and in default of such joint appointment the survivor had such power, the husband and wife executed a joint appointment, which was held not to be valid in consequence of the husband's bankruptcy; and it was decided that the joint appointment was not valid as the appointment of the wife, she having survived. An appointment, however, by her after her husband's death was sustained.

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In the present case there was no joint appointment by the instrument of September 1842. It was not valid as the separate appointment of the wife, she not having survived. I do not understand how the mere fact of the instrument having been in the handwriting of the husband (who it does not appear had any intention, in September 1842, by drawing up the instrument to execute his power jointly with his wife or separately, subject to the contingency of his surviving her) can, by the fact of his having proved the instrument as her will, be considered as having executed his power.

I do not consider that the mere fact of the instrument of September 1842 (which purported, and was intended to be, the will of the wife) being in the handwriting of the petitioner could, under the facts of this case, be considered an appointment by the petitioner in the lifetime of his wife, and valid because he happened to survive; nor do I think his having taken out probate of that instrument makes any difference. The taking out probate did not make it his act, but rather disaffirmed that it was so.

I am therefore of opinion that I am also bound to set aside the declaration in the decretal order that the sum of £1000 was well appointed. I do not, however, decide that the petitioner may not now execute his power as survivor; perhaps he may, on the authority of *Hole v. Escott*, do so; but I offer no opinion on the subject.

With respect to the question raised by Counsel for Mrs. Elizabeth Stoney (supposing the decision of the Master to be erroneous), that under the settlement executed on her marriage, and bearing date the 24th of January 1845, to which her father, the petitioner, was a party, £500 was appointed to her, I do not think the question pro-

(a) 4 M. & Cr. 187.

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*Order.*

perly arises on the present appeal motion, and I shall offer no opinion upon it.

I shall make the following order:—

It is ordered by the Right Hon. the MASTER OF THE ROLLS, that the order of William Brooke, Esq., in this matter, bearing date the 11th of May 1853, be varied and set aside, so far as it declares that the two sums of £4000 and £1000 respectively, late Irish currency, in said order mentioned, were well appointed, and so far as it declares that the said sums of £4000 and £1000 became distributable, as in said decretal order and in the second schedule thereto mentioned; and so far as it contains a declaration as to any of the children of the petitioner being entitled to have their shares invested and transferred, as in said decretal order mentioned; and so far as it contains any declaration founded on the decision of the Master, that said two sums are well appointed: and the Court doth declare that the said two sums of £4000 and £1000 were not, nor was either of them, well appointed by the said will or instrument, bearing date the 15th of September 1842: and doth further declare that said two sums are distributable as in default of appointment. This order to be without prejudice to any application or proceeding which the parties claiming under the marriage settlement of the 24th of January 1845, executed on the marriage of James Johnston Stoney with Elizabeth Lucy Minchin, may be advised to take, in respect of their allegation that a sum of £500 was duly appointed under the provisions of the settlement by the petitioner, who was a party thereto: and the Court doth declare that the several parties who have appeared by Counsel on this motion are entitled to their costs of so appearing, along with their costs to which they are declared entitled by said decretal order, with liberty to the parties claiming the said sums of £4000 and £1000 as in default of appointment to apply as they may be advised; and let the deposit be paid back.

1853.  
Rolls.

In the Matter of HERRICKS Minors.

Nov. 25, 29.

Dec. 14.

This was an application on behalf of Gersham Herrick, one of the sureties of the late receiver in this matter, for an injunction to restrain the issuing of a writ of *levari* on foot of judgments which had been obtained on the receiver's recognizance, under the circumstances stated in the judgment of the MASTER OF THE ROLLS.

An order was made in a minor matter, that a receiver, who was also executor to the minors' father, should be at liberty until March 1847 to manage certain lands and the stock thereon in the same manner as the minors' father was in the habit of managing the same—the receiver undertaking to keep regular accounts of his receipts and to furnish the same to the Master every three months; and after March 1847, the receiver

When the motion was moved by Mr. *Deasy* and Mr. *Chatterton*, for the surety, Mr. *Martley* and Mr. *Jenkins* opposed it, on grounds which the MASTER OF THE ROLLS thought were properly the subject of a cross notice. The motion having stood over, a cross notice was served with a schedule containing the particulars of the several sums, amounting in the whole to £519. 15s. 3d., which it appeared to the guardian of the minors might be properly chargeable against the receiver or his surety, for the management of the lands of Coolkirky, and offering to submit to such order as the MASTER OF THE ROLLS might make with regard to the liability of the surety to the several items, some of which consisted of interest on the quarterly balances.

In support of the right to issue a second *levari*, the Counsel for

was ordered to take proper steps for procuring tenants to the property. The receiver continued to manage the lands after March 1847, without a further order.

*Seemle*, the receiver's surety was liable for the management by the receiver as such; but not for so much of the quarterly balances as was due by him as executor up to March 1847.

*Quere*—Whether the surety was liable to balances due after March 1847?

It is discretionary to charge a receiver's surety with interest on his balances, and the surety having paid the entire of the balances in this case, the Court refused to do so.

Judgment by default was entered up on a receiver's recognizance; a *levari* issued against the surety, and the Sheriff returned goods on hands for want of buyers. An injunction was granted against the *levari*, on payment of the amount of it into Court. The surety applied to set aside the judgment by default, and an order was made that the judgment should stand, but that the surety might be at liberty to plead to the *scire facias*. He did plead, and a demurrer taken to the rejoinder was allowed; and it was ordered that judgment be entered up for the plaintiff, which was accordingly done.

*Held*, that the latter judgment was irregular, and the first, not being a continuing judgment, and being determined by the death of the receiver, a *levari* could not be sued out on it.

The practice of the Petty-bag side of the Court, and of the three Law Courts under those circumstances, certified to the Master of the Rolls.

1853.  
Rolls.  
*In re*  
HERRICKS  
Minors.

Dec. 14.  
Judgment.

the guardian cited *Marsh v. Fawcett* (a); *Howell v. Hanford* (b).  
Mr. Deasy and Mr. Chatterton, for the surety, relied on *Fisher v. Carruthers* (c).

#### THE MASTER OF THE ROLLS.

In this case a motion has been made on the part of Edward Henry Herrick, one of the sureties of Gersham Herrick the elder, the late receiver in this matter, that Mrs. Catherine Herrick, the mother and guardian of the fortunes of the minors, and her solicitor, should be restrained from issuing any writ of *levari facias* on foot of the judgments obtained by her in the name of the Queen, at the Petty-bag side of the Court, on foot of the recognizance entered into by said Gersham Herrick as receiver in this matter (together with said Edward Henry Herrick and one George Dunne as his sureties), on payment to the said Catherine Herrick or her solicitor of the sum of £40. 14s. 2½d., being the amount of the taxed costs of the second judgment obtained on foot of said recognizance, after the deduction of a sum of £10. 8s. 3½d. lodged in Court by the said Edward Henry Herrick, said two sums making the sum of £51. 2s. 6d., the amount of said costs.

The receiver died in 1849, being, as was alleged by the said guardian of the minors, then indebted on foot of the balances on eleven quarterly accounts lodged by the receiver, but not certified. The receiver had passed his yearly accounts regularly, and duly lodged his balances, but the balances on foot of those quarterly accounts were not lodged.

The circumstances under which the receiver became liable to pass quarterly accounts were these:—the receiver was the executor of Thomas Herrick, the minors' father, and thus combined the two characters of executor of the personal estate and receiver over the real estate. The minors' father Thomas Herrick had in his lifetime carried on farming extensively, and had at his death a large stock of cattle on the lands of Coolkirky; and it having been thought that it would be beneficial to the minors to manage for a limited

(a) 2 H. Bl. 582.

(b) 2 Sir W. Bl. 845.

(c) Barnes, 202.

time the said farm as it had been managed in the lifetime of Thomas Herrick, an application was made by the receiver to the then Lord Chancellor of Ireland (Lord St. Leonards), on the 23rd of May 1846, for the purpose, when his Lordship made an order as follows :—" Let the petitioner be at liberty, until the month of March 1847, to manage the said lands of Coolkirky, and the dwelling-house, orchard and plantations thereon, situate in the county of Cork, and the stock now thereon, in the same manner, or as near thereto as practicable, as Thomas Herrick, deceased, the father of the minors, was in the habit of managing the same ; and it is further ordered, that in addition to a steward, dairy persons and labourers, the petitioner be at liberty to employ a caretaker for the preservation of the dwelling-house, orchard and plantations : and the petitioner undertaking to keep regular accounts of his receipts and payments, and to furnish the same to the Master every three months, it is further ordered that he do pay the amount of the profits which shall appear on such accounts, to be verified by the affidavit of the petitioner, into the Bank of Ireland, with the privity of the Accountant-General of the Court, to the credit of the matter : and it is further ordered that the petitioner do take proper steps for procuring tenants to the property at the expiration of the period before mentioned."

The period before mentioned was March 1847. The receiver did not pay any attention to the express direction thus given by Lord St. Leonards at the end of the order ; and he continued to manage the farm of Coolkirky and the stock of cattle thereon until his death in 1849, without having obtained any order from the present Lord Chancellor or from this Court to continue to manage the said farm and the stock of cattle thereon, as the late Thomas Herrick the father of the minors had done.

The receiver was only bound to pass three quarterly accounts under Lord St. Leonards' order. One of those accounts was regularly passed and the balance paid, and no question arose as to the liability of the surety Edward Henry Herrick as to that account. But he has been made responsible not only for the balance on the second and third accounts furnished under Lord St. Leonards' order, but for the balances on the remaining nine quarterly accounts ; the

1853.  
Rolls.  
In re  
HERRICKS  
Minors.  
Judgment.

1853.  
*Rolls.*  
*In re*  
HERRICKS  
*Minors.*  
*Judgment.*

receiver having managed the lands of Coolkirky and the stock of cattle thereon, subsequently to March 1847, without the authority of the Court. The Master had no jurisdiction whatever to extend the period mentioned in Lord St. Leonards' order, or to set aside the express direction at the close thereof.

It will be observed that the balances on foot of those accounts do not consist simply of profits derived from the farm of Coolkirky, but consist partly of such profits, and partly of profits arising from the stock of cattle thereon, which stock of cattle belonged to the receiver, not in his character of receiver, but in his character of executor.

Upon what ground it could be held that the surety was responsible under the terms of the condition of the recognizance for the whole of such balances, I am entirely at a loss to understand; and yet Edward Henry Herrick has paid all those balances. The decision of the Lord Chancellor on the demurrer taken at the Petty-bag side of the Court, to which I shall hereafter advert, decided nothing more than that the surety was responsible for the management by the receiver as receiver; but I do not understand that his Lordship decided that the surety was liable for the entire balances, that is, for so much thereof as the receiver was accountable for in his character of executor. The various sums with which the receiver debits himself in relation to the stock of cattle on the lands, for example, for the milk and butter, was chargeable against him in his character of executor, and not in his character of receiver; and I am unable to understand on what principle, having regard to the terms of the condition of the recognizance in this case, the surety was liable for the entire balance on the eleven quarterly accounts, assuming him to have been liable to any portion of the balances of the last nine of those accounts—which is very doubtful. However, no question arises as to the liability of the surety for those balances, as he has paid them into Court long ago.

The guardian of the minors, not satisfied with the surety Edward Henry Herrick having paid the entire of the balances on those eleven quarterly accounts (to a considerable portion of which he was not, in my opinion, legally liable), has served a cross notice to make the said Edward H. Herrick responsible for

interest on those balances, and for other sums mentioned in the cross notice, in addition to the balances and interest.

The receiver regularly paid in the balances on his yearly accounts; and if the guardian of the minors had performed her duty, and required it, there is no doubt, on the facts appearing in this case, that the receiver, although the passing of the quarterly accounts might have been postponed, would, if so required, have paid in the balances on those quarterly accounts. The receiver was in considerable credit in his lifetime, but has died insolvent.

The Master postponed passing the eleven quarterly accounts, considering, as I understand, that these were connected with the executorial account, which the receiver was bound to pass, so far as said quarterly accounts related to the stock of cattle managed by the receiver, and which stock formed part of the personal estate of Thomas Herrick.

I am clearly of opinion that I have a discretion, under the authority of the case *Dawson v. Raynes* (a), not to charge the receiver, under the circumstances of the case, with interest; and I am of opinion that it would be most unjust to charge him with such interest.

I am, however, relieved from yielding to any of what I consider to be the unjust claims in the cross notice, by a legal difficulty which stands in the way of the enforcement of those claims by the guardian.

The facts of the case which give rise to such legal difficulty are these:—

The guardian of the minor, having obtained liberty to sue the sureties of the late receiver, took proceedings on the recognizance against Edward Henry Herrick, on whose behalf this motion has been made.

A *scire facias* having issued at the Petty-bag side of the Court of Chancery, judgment was entered up by default against the said Edward Henry Herrick. A *levari* issued on said judgment, marked for £290. 12s. 0d., with interest on £280. 4s. 5d. from the 13th of June 1852, at £4 per cent. The Sheriff returned goods on hands for want of buyers. That return fixed the Sheriff.

(a) 2 Russ. 466.

1853.  
*Rolls.*  
*In re*  
HERRICKS  
*Minors.*  
*Judgment.*

1853.  
*Rolls.*  
*In re*  
**HERRICKS**  
*Minors.*  
*Judgment.*

On the 17th of December 1852, an order was made by me in the matter of *Herricks minors*, restraining the guardian of the minors and the Sheriff from executing the *levari*, on the terms of Edward Henry Herrick lodging in Court the amount of the *levari*, which he accordingly did.

I had not authority to allow Edward Henry Herrick to plead to the *scire facias*, not having jurisdiction to make an order at the Petty-bag side of the Court.

On the 17th of December 1852, an application was made to Lord Chancellor Blackburne, on the part of the said Edward Henry Herrick (the surety), to set aside the judgment by default, and for liberty to plead.

Lord Chancellor Blackburne made an order on the same day, directing that the judgment should stand, and that, notwithstanding the judgment, the defendant might be at liberty to plead to the *scire facias* on the recognizance. Edward Henry Herrick did plead; and a demurrer having been taken to the rejoinder, an order was made by the present Lord Chancellor on the 28th of May 1853, as follows:—"Allow the demurrer taken by the plaintiff to the defendant's rejoinder, and let judgment be entered up for the plaintiff."

I suppose the attention of the Lord Chancellor was not called to the terms of Lord Chancellor Blackburne's order, directing the judgment by default to stand.

I do not understand how judgment could regularly be entered up against Edward Henry Herrick on the order of the 28th of December 1853, having regard to the order of Lord Chancellor Blackburne, of May 1852, directing the judgment by default to stand.

How can there be two judgments on the same recognizance against the same party, and how should each judgment be made up?

How could the record be made up, under the order of the 28th of May 1853—first, having regard to the fact that execution issued on the first judgment, and that the Sheriff returned goods on hands; and secondly, having regard to the special pleadings filed after the judgment by default, and on which special pleadings the decision has been given?

I shall, however, assume that two judgments may be made up on the same security, such security not being a continuing security, but being at an end on the death of the receiver in 1849, except as to breaches then incurred.

Can a second *levari* issue, not merely for the costs of the proceedings upon the demurrer, all of which costs the surety offers by his notice to pay, but for the several surcharges in the cross notice mentioned, such surcharges amounting to £229. 3s. 3d?

If such new *levari* should issue, would it be on the first or second judgment?

It is insisted by the guardian of the minors that such new execution may now issue.

It appears to me to be contrary to the principles of the Common Law—first, that two judgments should be entered on the same security; and secondly, where a security is not a continuing security (and the recognizance in this case had, as I have already stated, ceased to be a continuing security by the death of the receiver in 1849), that a party should mark his execution for a sum which he now alleges was too small; and that after the Sheriff's return, and the amount of the *levari* lodged in Court, he should seek to mend his hand by issuing a further execution for nearly an equal amount. As to the course of practice in England, I apprehend there is no doubt that such a proceeding never was heard of there.

In the case of *Fisher v. Carruthers* (a), the plaintiff, having recovered judgment in the original action for £26, levied £13 on the goods of the defendant, one of the bail, with intent to levy the remaining £13 on the goods of B, the other bail; but the effects of B, amounting to no more than £6, the plaintiff had resort back again to the goods of the defendant, and by a second execution levied £7 more, being the residue of the £26 recovered. This was held to be irregular:—"Plaintiff cannot levy by parcels without defendant's request and consent; he might have levied the whole upon the defendant at first, who it appears had the goods to answer." The rule to show cause why the second *fi. fa.* against the defendant should not be set aside, and restitution, was made absolute.

(a) Barnes' Notes, 202.

1853.  
Rolls.  
In re  
HERRICKS  
Minors.  
Judgment.

1853.  
*Rolls.*  
*In re*  
**HEBRICKS**  
*Minors.*  
*Judgment.*

In the case of *Howell v. Hanforth* (a), "the Court inclined strongly to think that though at Common Law, if the Sheriff only levies part of the debt on a *fieri facias* marked for the whole, the plaintiff may have subsequent writs till the whole is levied; yet a plaintiff shall not make it for part, and afterwards sue out subsequent writs for the residue, which would tend to great oppression."

In that case, however, the judgment being a continuing security to secure an annuity, the Court allowed the judgment to stand as a security for future arrears, with liberty to apply to the Court from time to time to sue out fresh executions.

Where however the security is not a continuing security (and in the present case it ceased to be a continuing security in 1849), it is clear, according to the English practice, that a party cannot first have the execution for a part of the demand and then for another portion, as is in effect sought in the present case by the cross notice.

I entertained no difficulty upon the law when the case was argued, but the question has been so strongly contested by the Counsel on the part of the guardian that I have thought it right (not however from any doubt on my own part) to request the officers of the Courts of Law and the Petty-bag side of the Court of Chancery, to state the practice of those Courts, both as to the entering up two judgments on the same security, as also as to the issuing an execution for part of the sum due, and afterwards for a further portion, the security not being a continuing security; and the following statements have been made to me by the officers of the respective Courts. The statement of the course of practice at the Petty-bag side of the Court of Chancery has been sent to me by the Clerk of the Crown and Hanaper, and is as follows:—

"This is the only instance I find in the Crown and Hanaper office, in which two judgments were entered up against the same party on the same recognizance.

"In this case it was done, as the first judgment (one by default) was entered up on the 14th of June 1852, and by an order of Lord Chancellor Blackburne, of the 17th of December 1852, said judg-

(a) 2 Sir W. Bl. 845.

ment was ordered to stand, and that notwithstanding said judgment defendant might be at liberty to plead to the *scire facias*, and the defendant to pay the costs of the proceedings already incurred.

“On the 28th of May 1853, the present Lord Chancellor allowed the demurrer to the defendant’s rejoinder, and ordered that judgment should be entered up for the plaintiff; and which judgment, on the requisition of the 30th of May 1853, of the plaintiff’s solicitor, in pursuance of said order, was accordingly entered up.

“The Clerk of the Crown and Hanaper apprehends he could not issue a second *levari*, without a special order of the Court.”

I take for granted that the Lord Chancellor would not have ordered a second judgment to be entered up on the same security, had his Lordship’s attention been called to Lord Chancellor Blackburne’s order; such a proceeding never having been before heard of in England or Ireland.

The officer of the Court of Exchequer, Mr. Yeo, has furnished to the Court the following statement :—

“According to the course of practice in the Court of Exchequer, where liberty is given to a defendant to plead, after judgment entered and execution levied, and such judgment directed to stand, no second judgment for the plaintiff is ever entered up; nor can it be, the subsequent pleadings being to a declaration upon which judgment has already been given. The giving liberty to the defendant to plead, under such circumstances, is an interlocutory proceeding directed by the Court, for the purpose of ascertaining whether the defendant has in fact a defence to the action or not, and merely suspends the plaintiff’s right to the proceeds of his execution in the meantime. If the defendant succeed, the Court will, thereupon, set aside the plaintiff’s judgment and execution, order the restoration of the money levied, and give judgment for the defendant, as if he had originally pleaded in the action; but if the plaintiff be the successful party, he will be awarded the fruits of his judgment and execution, as if no such subsequent pleading had taken place; and the Court will also direct the defendant to pay to the plaintiff the costs incurred by reason of those subsequent proceedings, but no further judgment is entered for the plaintiff.

1853.  
Rolls.  
In re  
HERRICKS  
Minors.  
Judgment.

1853.  
*Rolls.*  
*In re*  
**HERRICKS**  
*Minors.*  
*Judgment.*

This is the course adopted under the Interpleader Act, which is somewhat an analogous proceeding. If the plaintiff have omitted to mark his execution in the first instance, for a sufficient sum, he never can increase the amount of that execution, unless the judgment be a continuing security, as for instance for the performance of covenants."

Mr Yeo has also furnished the Court with the following recent decision :—

"On last Saturday week, Mr. Lawless moved before Baron Pennefather, in a case of *French* (Treasurer of the County of Roscommon) v. ———, for leave to insert the amount of the taxed costs of the cause in a judgment entered upwards of a year. It appeared that an execution had issued for the amount of the debt, and had been lodged with the Sheriff, but no levy had been made under it; and Baron Pennefather refused the motion, on the ground that after execution issued, and the certificate under the statute of *Anne*, given by the plaintiff, the record was complete, and no increase in the award by the Court of the debt or costs, and consequently in the execution upon it, could afterwards be made."

The following statement has been made by Mr. C. G. Burke, the Master of the Court of Common Pleas :—

"Common Pleas office, Dec. 13, 1853.

"I have not found a second separate final judgment marked on the same security (unless a continuing one), against the same party. After judgment, execution, and levy of goods, when any question is allowed to be raised, and the Court orders the judgment to stand, the question is tried in the nature of an issue, and does not affect the judgment entered, provided the plaintiff succeeds. When a plaintiff issues execution for a sum less than he may be entitled to, he cannot resort to his judgment a second time, unless the security be a continuing one.

"The costs of a demurrer are commonly recoverable by the Act, 3 & 4 *Vic.*, c. 105, s. 59. But in such a case as that mentioned, I think the Court would direct the costs to be added to the judgment entered, or give an order for their payment."

The following statement has been made by Mr. Bushe, the Master of the Court of Queen's Bench :—

1853.  
Rolls.  
In re  
HERRICKS  
Minors.  
Judgment.

"I do not recollect any state of circumstances exactly similar in the Queen's Bench, no second judgment being ever entered for the plaintiff. The defendant having been allowed to plead, and judgment having been given for the plaintiff on demurrer, that judgment can only be made up according to the prayer of the *scire facias*, viz. :—that the plaintiff do have execution for his debt, according to the force, form and effect of the recognizance. Nothing would appear on the face of the record to show that the judgment was for the same debt as that for which the first judgment by default was marked; therefore the plaintiff would be entitled to demand an execution on foot of the second judgment, certifying at his peril as to the amount due. As to the second question, if a plaintiff marks an execution for a certain sum, and levies that amount, he never can, unless the judgment be a continuing security, resort a second time to the same judgment, and no officer knowing the circumstances would grant him a second execution. Therefore, in the present case, the plaintiff cannot fall back on the first judgment by default, on the allegation of not having levied his full debt. I think the order (*i. e.* the order of the 28th of May 1853) should be varied, by allowing the demurrer, without marking any judgment thereon, directing the first judgment to stand, and giving the plaintiff an order for the costs of the subsequent proceedings."

With respect to the observation of Mr. Bushe, that if a second judgment was entered up, nothing would appear on the record to show that the judgment was for the same debt or demand as that for which the judgment by default was marked; he has, I think, overlooked the difficulty adverted to by Mr. Yeo.

If judgment by default is marked on a declaration, or on a *scire facias* upon a recognizance, there is no pleading or writ of the plaintiff to which the plea can be put in.

The proceeding on the plea and subsequent pleadings is, as Mr. Yeo observes, "an interlocutory proceeding," judgment being already marked on the writ or pleading to which the plea is put in.

It thus appears from the certificates of the Clerk of the Crown and Hanaper, and the officers of the three Law Courts, first, that no

1853.

Rolls.In re

HERRICKS

Minors.Judgment.

second judgment has ever to their knowledge been entered up for a plaintiff on the same security against the same party, previous to the present case; and secondly, that after an execution has been marked for a certain sum and delivered to the Sheriff, and a return made by the Sheriff, such as was made in this case, no second execution could regularly issue for an additional sum beyond that marked on the first execution, unless in the case where the judgment is a continuing security. According to Baron Pennefather's decision in the order I have referred to, and which I apprehend was clearly right, the sum marked on the execution could not be altered after the writ was delivered to the Sheriff, although it was not executed or returned.

If Edward Henry Herrick were to have declined to pay the costs of the demurrer, the most regular proceeding to recover those costs would have been that pointed out by Mr. Yeo, but probably a second *levari* might have issued on the first judgment for those costs. However, if such proceedings could have been taken, it would be in no way inconsistent with the general principles I have stated, because as the right to the costs accrued after the first execution was executed, the case might fall within the principle which allows further executions to issue on further breaches accrued after the first levy.

In the present case the surety offers by his notice to pay all the costs. I shall, therefore, he undertaking to pay such costs within ten days, grant an injunction against the issuing of any further *levari* for the amount of the surcharge sought to be established by the cross notice, and I shall refuse such cross notice with costs, which I shall direct the receiver in the matter to pay.

It is said I should not give costs to Edward Henry Herrick for opposing the cross notice, as I directed it to be served. I stated, when the case was moved on the 15th of July, that I could not decide on the question of the surcharge without a cross notice being served, specifying the items. But it is idle to say that when I direct a cross notice to be served, I thereby decide by anticipation the costs. I simply desired it to be served, it having been very unreasonable both to the Court as well as to Edward Henry Herrick,

to discuss the propriety of surcharging him with various items without a specification as to what those items were.

As I presume, from the great zeal with which this case has been argued on the part of the guardian, that the cross notice was served under the advice of Counsel, I must order that the guardian of the minors shall have the costs of the motion as costs in the matter; but I must say that the proceeding against the security of the receiver has been, in my opinion, extremely oppressive, and that he has paid much more than he was legally liable to pay.

1853.  
*Rolls.*

*In re*  
HERRICKS  
*Minors.*

*Judgment.*

1852.  
*Chancery.*

PERSSE v. PERSSE.

(*In Chancery*).

June 7, 9,  
 10, 12.

By a deed of 1827, R. P. covenanted with his son D. P., that after the decease of R. P. P., the estate which should thereupon descend to or vest in R. P., should be conveyed to certain uses. R. P. P. was found a lunatic, but in 1820 he had made a will, under which, if valid, G. P. took an estate tail. In 1830, the lunatic being dead, R. P., in violation of his covenant, conveyed the estate to R. H. P. In 1832 an ejectment was brought by those claiming under the will of the lunatic, at the trial of which R. P. and R. H. P. disputed the will. The conveyance of 1830 was set aside by a decree of the House of Lords, by which D. P. and his children were declared entitled, as against R. P. and R. H. P., to the benefit of the deed of 1827, and it was referred to the Master to settle a conveyance. The Master, by his report in 1843, found that D. P. had not laid before him any conveyance. In 1841, R. H. P. being in possession, a compromise was entered into between him and G. P., and two deeds were executed, by one of which G. P. released all right and title to the estate to R. H. P., in consideration of a conveyance of a portion of the estate which was made by the other deed. A supplemental bill having been filed by D. P. and his children to carry the decree of the House of Lords into execution against R. H. P. and G. P., who was not a party to the original suit—

*Held 1.*—That though the plaintiffs had not availed themselves of their right of having a conveyance under the decree, they had not forfeited their right to the benefit of it, as R. H. P. had by the deeds of 1841 disabled himself from conveying the legal estate.

2.—That the first deed of 1841 being a release, and not a conveyance, was an acknowledgment of the estate by descent in R. H. P., and operated to confirm that estate, and therefore that the plaintiffs were entitled to have the Lords' decree enforced against G. P. (as claiming under R. H. P.), although he was not a party to the original suit.

The uses to which the estate was to be conveyed by the deed of 1827 were to D. P., remainder to the first and every other son of his first marriage successively, and the *heirs male* of each such son lawfully issuing, remainder to the right heirs of D. P., who, on the settlement executed on his second marriage, conveyed his supposed reversion to the use of the children of the second marriage. D. P. and his children of both marriages were plaintiffs in the original and supplemental suits.

*Quære*—Whether the fee vested in the sons of the first marriage, and whether the children of the second marriage took any estate?

But as the House of Lords had declared that the children of the second marriage were entitled to the benefit of the deed of 1827, the Court held that there was no misjoinder of plaintiffs in the supplemental suit.

children's portions, to the first and every son of the marriage successively, "and the heirs male of each such son lawfully issuing," remainder to his own right heirs. There was issue of the marriage Dudley Persse the younger, and Catherine Henrietta Persse and Maria Persse. Catherine Persse, otherwise O'Grady, died in 1829.

By an indenture, bearing date the 8th of December 1827, and made between the said Robert Persse of the one part, and Dudley Persse his son and heir-at-law of the other part, reciting that Robert Parsons Persse was seised in fee of the Castleboy estate, and that, in the event of his dying without issue, Robert Persse would be entitled to the said estate as the cousin and heir-at-law of the said Robert Parsons Persse, and that he was unmarried, and in a state of mental and bodily imbecility, and that it was necessary for the protection of his person and property to sue out a commission of lunacy against him, and to institute certain legal proceedings, and that Dudley Persse had agreed to do so at his own expense; and further reciting that in consideration of such agreement, and of natural love and affection, Robert Persse had agreed that his said expectancy upon the decease of Robert Parsons Persse should stand limited to the use of the said Robert Persse for life, and after his decease to the uses thereafter limited: in consideration of the said agreement, and of natural love and affection, the said Robert Persse, for himself, his heirs and assigns, covenanted with the said Dudley Persse, that after the decease of Robert Parsons Persse, the Castleboy estate, which on his death should descend to and vest in Robert Persse, should be and remain to and be vested in Dudley Persse, and should accordingly be conveyed to him to the use of Robert Persse for life, and after his death for the several uses, estates and limitations, &c., as were expressed of and concerning the Roxborough estate, in the settlement of the 11th of November 1826.

Dudley Persse, at his own expense, caused a commission of lunacy to be issued in 1828, and Robert Parsons Persse was found a lunatic by the inquisition. He died on the 25th of October 1829, and Robert Persse thereupon became seised of the Castleboy estate.

In 1833, Dudley Persse married Frances Barry, and on the occa-

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v.  
PERSSE.  
—  
*Statement.*

1852.  
*Chancery.*  
**PERSSE**  
*v.*  
**PERSSE.**  
*Statement.*

sion of the marriage a settlement was executed, bearing date the 15th of July 1833, by which the reversion of the Roxborough estate, after the limitations of the settlement of the 11th of November 1826, was conveyed to trustees to the use (subject to a term of 1000 years) of Dudley Persse for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of the second marriage in tail, remainder to the right heirs of Dudley Persse; and Dudley Persse covenanted that, when he should become actually possessed of the Castleboy estate, he would settle the same to the same uses as were thereby expressed concerning the Roxborough estate.

By a deed of the 9th of June 1830, reciting that Robert Persse had, by an indenture of the 1st of May 1823, sufficiently provided for his eldest son Dudley Persse, and that he was seised in fee in possession of the Castleboy estate, Robert Persse, in consideration of £16,000, secured by the bond and warrant of attorney to confess judgment of Robert Henry Persse, conveyed the Castleboy estate to the use of himself for life, remainder to the use of Robert Henry Persse and his heirs. Robert Persse and Robert Henry Persse entered into possession of the Castleboy estate immediately after the death of the lunatic. In 1833, an ejectment was brought by George Persse, who claimed under an alleged will of the lunatic. Defence was taken by Robert and Dudley Persse. The ejectment went down to trial in that year, and there was a verdict for the defendants.

On the 29th of June 1835, Dudley Persse and his minor children of both marriages filed the original bill in this cause against Robert Persse and Robert Henry Persse, praying that the deed of the 9th of June 1830 might be declared fraudulent and void, and might be brought into Court to be cancelled, and that Robert Persse and Robert Henry Persse might, in pursuance of the covenant of Robert Persse, in the deed of the 8th of December 1827, be compelled by the decree of the Court to convey the Castleboy estate to the uses specified in the settlements of the 11th of November 1826, and the 15th of July 1833, so far as the same were then capable of being effectuated; and that it might be referred to one of the Masters to prepare a conveyance for that

purpose; and that Robert and Robert Henry Persse might be restrained from committing waste on the lands of Castleboy.

On the 7th of February 1837, a decree was pronounced by Lord Plunket, dismissing the bill. There was an appeal to the House of Lords, who, on the 7th of May 1840, ordered that Lord Plunket's decree be reversed, and declared that the plaintiffs were entitled to the benefit of the indenture of the 8th of December 1827, and the covenants and agreements therein contained; and that the said indenture of the 9th of June 1830 was to be considered as fraudulent and void, so far as it affected or interfered with the said deed of the 8th of December 1827.

On the 19th of November 1840, the cause was again set down to be heard before Lord Plunket, when the decree of the House of Lords was adopted by the Court; and it was referred to the Master to settle a proper deed of conveyance, to be executed by all necessary parties, conveying the Castleboy estate, in pursuance of the covenants contained in the deed of the 8th of December 1827; and it was further ordered that all necessary parties should execute the same, and an injunction was granted to restrain Robert Persse and Robert Henry Persse from committing waste on the lands.

The Master, by his report in 1843, found the amount of the waste committed by the defendants, and that he had not settled any conveyance, not having been required to do so by the plaintiffs, who declined to furnish any draft thereof. Robert Persse died on the 23rd of January 1850; Robert Henry Persse continued in possession of the Castleboy estate.

By a deed, bearing date the 28th of May 1840, Robert Persse conveyed to Robert Henry Persse and his heirs the Castleboy estate, charged with the payment of an annuity of £400 a-year to Robert Persse.

By a deed, bearing date the 2nd of January 1841, made between George Persse of the one part and Robert Henry Persse of the other part, reciting the death of Robert Parsons Persse, and the will which was set up by George Persse; and that by it George Persse claimed to be entitled as next tenant in tail to the Cas-

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*Chancery.*  
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*Chancery.*  
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 —  
*Statement.*

tleboy estate, upon the death of Patrick Persse, a prior devisee, who died in 1833, and that Robert Persse had entered into possession of the estate as heir-at-law of Robert Parsons Persse; and reciting the proceedings in the ejectment brought by George Persse in 1833, and that Robert Henry Persse and George Persse had agreed to adjust their conflicting claims in respect of the testamentary paper, upon the terms of George Persse releasing to the said Robert Henry Persse all his right and interest in the said Castleboy estate, save and except three townlands; and upon the further terms of Robert Henry Persse conveying all his estate and interest in the said last mentioned townlands, unto the said George Persse, his heirs and assigns, and also granting to him a term of 1000 years in the residue of the Castleboy estate, as an indemnity against any deficiency in the rents of the three townlands, to make up the sum of £319. 2s. 6 $\frac{1}{2}$ d.: George Persse released to Robert Henry Persse and his heirs all his estate, right and interest in the Castleboy estate, save and except the said three townlands.

By another deed of the same date, Robert Henry Persse conveyed the said three townlands (Ballynacreggy, Blackrock and Gurtheleman) to George Persse and his heirs, and also conveyed to him the residue of the Castleboy estate for 1000 years, as an indemnity against any deficiency in the rents of the said three townlands.

On the 1st of August 1851, a supplemental bill was filed by Dudley Persse and his wife, and the children of both marriages, praying that it might be declared that they were entitled as against Robert Henry Persse and George Persse to the benefit of the said proceedings and decree; and that the defendants might be ordered, in pursuance of the covenants contained in the deed of the 8th of December 1827, to execute a proper deed for conveying the lands comprised therein to the uses of the settlements of the 11th of November 1826 and the 15th of July 1833; an account of the rents and profits, and that Dudley Persse might be put into possession of the lands, or a receiver might be appointed.

The defendant Robert Henry Persse, by his answer, insisted that he was entitled to all the estate, right, title and interest of George Persse, as devisee of Robert Parsons Persse, beneficially, and not in

trust for the plaintiffs or any other person ; that there was no fraud in the agreement stated in the deeds, but it was a *bona fide* agreement ; and he relied on the will of Robert Parsons Persse as conferring on him a valid title. He stated that up to the time of the trial of the ejectment in 1833, he had been led to believe that the said will had been cancelled or revoked, but that he then believed it had never been cancelled or revoked, and he submitted that the validity of the said will should be tried ; but until that was determined, no decree ought to be made in the cause.

George Persse submitted that he was not bound by the former proceedings in the cause, not having been a party to them ; and he insisted that the lands passed to him by the will of Robert Parsons Persse, which was duly signed and attested. He stated that he had been in possession of the three townlands conveyed to him by the deed of 1841, since January 1841, and he insisted on his right to hold possession of them under the said will, which bore date the 15th of March 1820 ; and he further submitted, without relinquishing his right as devisee, that by the operation of the two deeds of the 2nd of January 1841, he was a purchaser for valuable consideration, without notice of the alleged equitable contract contained in the deed of the 8th of December 1827, which was not registered as to the lands of Castleboy.

The plaintiffs proved that at the trial of the ejectment in 1833, the will of the 15th of March 1820 was relied on by the lessor of the plaintiff, and disputed by the Counsel for Robert Henry Persse. They also proved that George Persse was present in the Court of Chancery on the 19th of November 1840, when the cause of *Persse v. Persse* was heard by the Lord Chancellor.

The execution of the will of Robert Parsons Persse, bearing date the 15th of March 1820, was proved by the defendants, and evidence of his testamentary capacity at the time of the making of the will was also given.

Serjeant *Christian*, for Robert H. Persse, objected that there was a misjoinder of plaintiffs, for that the children of the second marriage of the plaintiff Dudley Persse, who were joined as co-plain-

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*Argument.*

tiffs, had no interest in the lands which were the subject of the suit. By the limitations of the settlement executed on the first marriage of Dudley Persse (which limitations also regulated the Castleboy estate), the estate was limited to the first son of the marriage, "and the heirs male of such son lawfully issuing." There were no words of procreation, as "body," &c.; and this limitation gave to the eldest son of the first marriage an estate in fee-simple: *Littleton*, sec. 31; *Abraham v. Twigg* (a). Dudley Persse had therefore no reversion which could be the subject of the second settlement; and the bill must be dismissed: *Richardson v. Nixon* (b); *Padwick v. Platt* (c); *Fulham v. McCarthy* (d).

Mr. *Martley*, for the plaintiff.

Although to make the limitation that of an estate tail, there must be some words in the limitation to show of whose body the issue is to be, yet it is not necessary that the word "body" should be contained in the limitation, and the intention of the parties to create an estate tail will be looked to: *Beresford's case* (e); *Shelley v. Lady Earsfield* (f). But even if this was not so, this bill is filed merely to carry out a decree of this Court, founded upon an order of the House of Lords, which declares that Dudley Persse, and the issue of *both* his marriages, are entitled to have this covenant specifically executed. There was issue of the second marriage, who were co-plaintiffs in the original suit.

THE LORD CHANCELLOR.

Without expressing any opinion upon the point of misjoinder, which has been stated by Serjeant *Christian*, I am of opinion that I am bound to hear this case upon the record as at present framed. The children of Dudley Persse, by the second marriage, were co-plaintiffs in the original bill with their father, and the

(a) Cro. Eliz. 478.

(b) 2 J. & Lat. 250; S. C. 6 Ir. Eq. Rep. 335.

(c) 11 Beav. 503.

(d) 1 House of Lords Cases, 703.

(e) 7 Rep. 135.

(f) 1 Ch. Rep. 110.

issue of the first marriage. No objection to the record on that ground appears to have been made, and they were continued in their position as appellants upon the appeal; no objection appears to have been taken in the House of Lords, of the kind now stated; and the Lords' order declares that the issue of the second marriage, as well as the other appellants, were entitled to a specific execution of the covenant which was the subject of the appeal. The present suit is merely in aid of it, and to facilitate the execution of the original decree pronounced in pursuance of that order; and I must therefore consider that this question is closed by the previous proceedings and the House of Lords' order, and I overrule the objection.

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 &  
 PERSSE.  
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Mr. *Martley*, Mr. *Lefroy* and Mr. *Lawson*, for the plaintiffs, relied on the decree of the House of Lords, as determining the rights of the parties in this cause, under the deed of December 1827, and binding on Robert Henry Persse and all claiming under him. They contended that the arrangement carried out by the deeds of 1841 was manifestly a fraudulent one, contrived to evade the decree of the House of Lords, of which George Persse had notice, and savouring of champerty: *Saunders v. Lord Annesley* (a); *Underwood v. Lord Courtown* (b); *Massey v. Batwell* (c); *Mitford on Pl.*, 68; 2 *Bac. Abr.*, 30; *Stevens v. Bagwell* (d); *Com. Dig., Maintenance*, A, 5; *Wood v. Downes* (e); *Bayley v. Tyrrell* (f); *Prosser v. Edwards* (g); *Co. Lit.* 369, a.

Serjeant *Christian*, Mr. *Brewster*, Mr. *F. Fitzgerald* and Mr. *Berkely*, for the defendant Robert H. Persse.

The decree of the House of Lords has been abandoned by the plaintiffs, who the Master finds declined to bring in a conveyance under it. If they had done so, this suit would have been unnecessary. We are ready, even now, to comply with the decree of the House of Lords by giving a conveyance of all the estate

(a) 2 Sch. & Lef. 73.

(b) 2 Sch. & Lef. 65.

(c) 4 Dr. & War. 56; S. C. 5 Ir. Eq. Rep. 382.

(d) 15 Ves. 139.

(e) 18 Ves. 127.

(f) 2 Ball & B. 263.

(g) 1 Y. & C. Ex. 481.

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*Chancery.*  
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*Argument.*

which we had when that decree was pronounced; but Robert H. Persse has since acquired a new estate under the will of Robert Parsons Persse, which has been clearly proved, and which is not struck at by the Lords' decree. That decree did not preclude Robert H. Persse from purchasing a different title. He might have conveyed the estate which he then had, and afterwards have purchased this title. The plaintiffs have, by their laches, waived their right under the decree, and they cannot complain of our dealing with George Persse, who had, under the will of R. P. Persse, the legal estate, *jus possessionis* and *jus proprietatis*: *Co. Lit.*, 111 *a*, 240 *b*.

Mr. Gayer, Mr. Deasy and Mr. P. J. Blake, for George Persse.

June 12.  
*Judgment.*

The LORD CHANCELLOR.\*

This is a supplemental bill, filed by Mr. D. Persse and his children, to have the benefit of a decree pronounced by the House of Lords on the 7th of May 1840, which reversed a decree of Lord Plunket, and declared the plaintiffs entitled to the benefit of an indenture of the 8th of December 1827, and a deed of the 9th of June 1830, to be fraudulent and void as far as it affected the indenture of the 8th of December 1827. This decree was afterwards, in November 1840, made the decree of this Court, and it was then referred to the Master to ascertain the proper parties to a deed to carry into execution the trusts of the deed of 1827, and to settle a conveyance for the purpose. The Master made his report in 1843, and found that he had not settled any deed, the plaintiffs having declined to lay a draft before him.

The provisions of the deed of 1827, which was a deed of covenant between Robert Persse and his son Dudley, were in effect that the estate of Robert Parsons Persse, called Castleboy, if it descended to Robert as his heir, should be settled to the same uses as the Roxborough estate had been settled on Dudley's marriage in 1826,

\* The Right Hon. FRANCIS BLACKBURNES.

but subject to an estate to Robert for his life. These articles were made for valuable consideration.

In 1829, the Castleboy estate descended on the death of Robert Parsons Persse to Robert, and he as heir entered and became seised. In fraud of the articles of 1827, he conveyed the Castleboy estate to his son Robert Henry, retaining to himself an estate for life. Both Robert and Robert Henry were defendants in the original cause, which was instituted in 1835. It appears that a will of Robert Parsons Persse, disposing of the Castleboy estate, was set up by George Persse, who brought an ejectment in 1833, to which Robert took defence. This ejectment was brought down for trial in that year; the jury disagreed, and no further proceedings at law took place. Both Robert and his son Robert Henry insisted on the trial, and admitted in the cause, that Robert P. Persse had died intestate. The plaintiffs in the cause having declined to submit to the Master a conveyance to carry the decree of the Lords into execution, matters so remained until the death of Robert Persse in January 1850; on that event the right of Dudley Persse accrued in possession, and there was a bill filed by him, which was afterwards amended, and George Persse, who had claimed the estate as devisee, was made a defendant.

By the bill and proceedings in this cause, it now appears that three deeds had been executed—one dated the 28th of May 1840, and the others the 2nd of January 1841. By the first of these deeds Robert Persse conveyed, or purported to convey, to his son Robert Henry the Castleboy estate, in consideration of an annuity of £400. The other two deeds are made between Robert Henry and George Persse, for the professed purpose of executing a compromise between Robert Henry, who had then become seised of his father's (Robert) estate, and George, the alleged devisee of Robert Parsons Persse. By one of them, George releases all his right in the Castleboy estate, save three denominations, to Robert Henry; and by the other, Robert Henry conveys to George the three denominations, and grants all the others to him for a term of 1000 years, in order to supply the deficiency in value of the three denominations, if it fell short of its then estimate.

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*Chancery.*  
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PERSSE.  
*Judgment.*

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*Chancery.*  
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 Judgment.

Two questions have been submitted to me on this state of facts: the first, whether I can now decree the execution of a conveyance to carry into effect the Lords' decree, the plaintiffs having declined to have it executed, by omitting to have a draft laid before the Master, as they had a right, and are therefore said to have been bound to do. By this omission it is contended they have waived their right, and that they cannot have relief in this suit. This objection, I confess, appeared to me to be of a very serious character before I was exactly informed of the facts. I am now, however, satisfied that it is not well founded. The object of the plaintiffs' suit was to have a legal conveyance executed by the proper parties, and for that purpose it was essential that the person who had the legal estate should be a party to and obliged to execute it. The first matter to be ascertained was, in whom it was vested. Now, as to this, the reply is simple. When the Lords made their order on the 7th of May 1840, Robert was tenant for life, with remainder in fee to Robert Henry, under the deed of 1830. By the deed of the 28th of May 1840, Robert Henry became seised of his father's estate for life. If matters had been allowed to remain so, the deed and proper parties could have been easily arranged, for Robert Henry had the whole legal estate; but the deeds of January 1841, which Robert Henry executed, totally disabled him to execute the decree, that is, to convey the legal estate; for by the deed of the 2nd of January 1841, in which he was a granting party, he had conveyed three denominations to George in fee absolutely, and the remainder to him for 1000 years: so that, in 1843, had the plaintiffs taken a conveyance from Robert Henry, it would have given them nothing in the three denominations, and in the rest only an estate subject to the trusts of the term of 1000 years. Such a conveyance, it is plain, could not have effectuated their right as established by the decree; and while Robert Persse the tenant for life lived, the same mode of evading the execution of the decree, which had been resorted to successfully in January 1841, would have been open to the defendants, who could, from time to time, have shifted the legal estate, and occasioned the necessity for filing bill after bill to bind the legal owner by, and compel him to execute, the trust. The justification therefore of the course adopted by the plaintiffs in

the cause, and of their omission to have a deed executed, to effectuate the decree, is found in the conduct of the defendants, who make the objection, and who, by their own act, baffled and frustrated the decree, designedly and unjustly, which it was their duty to have effectuated.

This is the substantial answer to the objection. That of form, founded on the supposed waiver of their right, arising from the same cause, admits of this answer, that though they did not avail themselves of the right to have a deed settled and executed, they did not thereby forfeit the benefit of the Lords' decree, which declared their right, and for ever bound the estate of Castleboy by the trusts of the deed of covenant of 1827.

The next objection to the relief sought by this bill is founded on the will of Robert P. Persse, which is proved in the cause, and by which the estate was devised to George Persse; the effect of which was to prevent the descent to Robert, and take away the whole basis of the articles of 1827, which, as well as all the rights and estates thereby contracted for, were contingent on the succession of Robert, as heir-at-law to the Castleboy estate. It has been contended by Robert Henry and George Persse, that no decree can be made until the invalidity of that will is established by the verdict of a jury. In my opinion, this will, whether valid, or, as Robert Henry contended, revoked, forms no defence against the right of the plaintiff to have the decree executed by those defendants.

It is now established that the articles of 1827 bound Robert Persse, who became a trustee of the estate, which, by the admission of all the parties in the cause, and the assumption of the decree, descended in 1829 to Robert, as heir of the lunatic. It is further established, that the deed of 1830, which conveyed to Robert Henry an estate in fee in remainder after the estate for life to Robert his father, was fraudulent and void, and that Robert Henry became a trustee of that estate for the plaintiffs, claiming as purchasers under the articles of 1827, and was bound by the decree of May 1840 to execute a deed to carry these articles into execution. Being thus bound, he took the conveyance from his father, on the 28th of May

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*Judgment.*

1840, even then accepting a title from him as heir. This deed having given him the life estate of his father, he subsequently, on the 2nd of January 1841, executes the two deeds already adverted to. It is worthy of observation that Robert Henry does not accept a grant from George of the denominations of which he was to remain seised; but that on the other hand, he conveys to George the three denominations which were to become his, and grants to George the indemnity term of 1000 years. It is obvious, therefore, that the parties, in framing this deed, were acting on the assumption that the title by descent was that with which they were dealing as the only real subject-matter of conveyance, and that it was to that title exclusively that they ascribed the actual seisin and possession of the estates. On the other hand, when the title of the devisee was dealt with, it was treated, as it was, as a claim by a party who had no right to deal with the possession. In fact and in law, Robert had entered and become seised as heir of the lunatic. This seisin was as a trustee subject to his own use for life, and this he transferred to his son, who thus became, as he was himself, trustee. The conveyance and grant to George, with notice of this trust, both actual and constructive, made George also a trustee, putting him as to all he took in the same position as Robert Henry himself. The very estate which George so acquired, and which, by acceptance from Robert Henry, he admitted his right to grant, was the estate which had descended, and which was bound by the trusts of the articles of 1827.

The case therefore of Robert Henry has this peculiarity, that it is that of a trustee, not setting up and claiming a title paramount to his title as trustee, but setting up a release of a contested claim, the consideration for which was his grant (in violation of his trust) to the claimant of a portion of the trust estates. How is it possible to maintain such a dealing, to the total subversion of rights established by a decree of a Court of Justice, through the undoubted agency and for the benefit of the person who was, in the view of this Court, the protector of those rights? If this device and contrivance succeed, then without investigation, trial, or even notice to the parties, this decree will have been rendered nuga-

tory and abortive, and the plaintiffs will have been deprived by their own trustee of part of the estate, and of the rest by a stranger, to whom their trustee betrays their possession; that trustee having, up to the time when he thus acted, denied and impugned the title which he thus recognises and deals for. If there were no authority to govern the decision of a case involving such consequences as must result from the success of the contrivance which has been resorted to and adopted in this case, its very dishonesty must have been fatal to it in any Court of Justice.

But fortunately in all its parts, and in every aspect of it, it is met and condemned by fixed and settled principles of law:—first, the release of George can only operate to confirm the estate of Robert Henry; and as that was an estate held by him in trust, the release, instead of achieving the intended fraud, operates to confirm the estate of which he was in the actual seisin as grantee of the heir of Robert P. Persse the lunatic. In the position in which Robert Henry and George stood, if the latter had a right he was dis-seised, and his release discharged the estate from the right of the releasor, and so operated not only to confirm Robert Henry's estate for the life of his father, but also all the uses to which the lands were to enure on his death, by virtue of the articles of 1827.

In *Littleton*, sec. 521, the law is thus stated:—"Also if my disseisor maketh a lease for life, the remainder over in fee, if I release to the tenant for life, this shall enure to him in the remainder. But if I confirm the estate of the tenant for tearme of life, yet after his decease I may well enter, because nothing is confirmed but the estate of the tenant for life, so that after his decease I may enter. But when I release all my right to the tenant for life, this shall enure to him in the remainder or in the reversion, because all my right is gone by such release."

That the release of George Persse to Robert Henry could only operate as a discharge, and not as a conveyance, is very plainly proved by the passages cited from *Co. Lit.*, p. 369, a. The law on this subject is most clearly and explicitly expounded by Lord Redes-

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 Judgment.

dale, in the case of *Saunders v. Lord Annesley* (a). He says, p. 105 :—"A conveyance by a person out of possession can only operate as a release, and if made to a stranger, where there is no privity, it can operate nothing." In p. 98 he says :—"Whenever a person comes to the possession either by judgment of law or by *his own* agreement, and holds that possession, he, and all who claim under him, must hold it according to his right to the possession, and cannot qualify it by any other right." The application of this in the present case is very obvious. Robert was tenant for life, with remainder to the persons claiming under the articles of 1827, as purchasers for valuable consideration from him. This estate he conveyed to his son, who was bound to hold it as his father was, and could neither alter nor qualify it, to the prejudice of the purchasers in remainder.

The law to the same effect is further laid down in p. 103, in terms peculiarly applicable to the position, right and obligations of all the parties in this transaction. Lord Redesdale says, "When possession is gained under a contract by a person having a right (and this, it is to be observed, was the condition of George Persse), he can only have it such as the person has it from whom he obtains possession, and is bound to accept the possession according to that right" (that is, George had it as Robert Henry and Robert had had it, and was bound by the right of the persons in remainder); and the passage concludes by assigning the reason, "and that, because according to the expression in the books, it was his folly to take possession in such a manner, instead of recovering it by lawful means."

This, he says, is the language of the law; and I may add, that if George has extinguished his title as devisee, and rendered its operation difficult or impossible, he is the author of his own injury. Legal rights must be asserted by legal means; it is palpable in this case that the means were as illegal as the design was collusive, and that that design was to evade the execution of the decree of the House of Lords, by repeating the same experiment which had been practised in 1830, and which that decree had pronounced to have been fraudulent and void.

(a) 2 Sch. & Lef. 73.

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*Chancery.*

THE QUEEN v. GUINNESS.\*

(Petty-bag Side.)

May 23.

THE recognizance in this case was entered into by Richard Samuel Guinness, as receiver in a cause pending in the equity side of the Court, and was in the usual form. The following are the material pleas put in to the *scire facias* issued upon it:—

The Crown is not bound by the Bankers' Acts, 33 G. 2, c. 14 (*Ir.*), and 40 G. 3, c. 22 (*Ir.*): and there is no distinction in this respect between a Crown debt proper, and one upon foot of a receiver's recognizance, which is executed for the benefit of the subject; and is in reality a security between private parties.

First plea—"And the said R. S. Guianesa, by, &c., comes and says, that our Lady the Queen ought not to have execution for the sum of £4500 in the said writ of *scire facias* mentioned, because he saith that heretofore and before the issuing of the said writ, he was a banker within the true intent and meaning of the statutable enactments made and in force concerning bankers in Ireland; and being such banker, he the said defendant stopped payment, heretofore, to wit, &c.; and the said defendant further saith, that the said sum of £4500 was a debt contracted and owing by him before he stopped payment; and that the cause of action, &c., accrued before such time as he stopped payment, to wit, &c.; and of this," &c.

Second plea—*Executio non, &c.*—"Because the said R. S. Guinness saith, that the said recognizance was taken and acknowledged for the security of the parties in a certain cause instituted and then pending in the High Court of Chancery of our Lady, &c., and wherein T. H. F. and W. C. were plaintiffs, and H. L. was defendant, and was not taken or acknowledged for any debt due to our said Lady, to secure the payment of any public debt, or the performance of any public duty; and the said R. S. Guinness further saith, that after the taking and acknowledging of the said recognizance, and after the enrolment of the same, &c., and after the said sum of £4500 became due and payable, and after the cause of action accrued to our said Lady, to wit, upon, &c., he the said R. S. Guinness, being a banker within the true intent and meaning of the

\* *Ex relatione* ALFRED M'FARLAND, Esq.

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statutable enactments made and then in force concerning bankers in Ireland, stopped payment; and the said R. S. Guinness further saith that the cause of action in, &c., accrued to our said Lady before he stopped payment as a banker, as aforesaid, to wit, &c.; and of this," &c.

Third plea—*Executio non*.—"Because that heretofore, to wit, before the issuing of the said writ, he the said R. S. Guinness was a banker within the true intent, &c. (as in the first plea), and did use, exercise and carry on the trade and business of a banker, according to the provisions of the said enactments, to wit, at, &c.; and the said R. S. Guinness further saith, that being such banker, he stopped payment heretofore, &c., to wit, &c.; and that according to the provisions of a certain Act of Parliament, &c. (the 33rd *G. 2*, c. 14 (*Ir.*), and of a certain other Act, &c. (the 40th *G. 3*, c. 22 (*Ir.*), E. B. and S. V. were approved of as trustees by the majority in value of the creditors of the said R. S. Guinness, heretofore, to wit, on, &c.; and the said R. S. Guinness further saith that he did, within three calendar months after he so stopped payment, to wit, on, &c., by certain indentures, &c., vest his whole real and personal estate in the said E. B. and S. V., as trustees for the payment of all the debts that were or should be due by him at the time of the execution of the said deeds. And the said R. S. Guinness further saith, that the said E. B. and S. V., afterwards, to wit, &c., in writing under their hands and seals, certified to the Right Hon. MAZIERE BRADY, being the Lord Chancellor of Ireland, that the said R. S. Guinness in all things conformed himself to the directions of the said Act of, &c. (the 33rd *G. 2*); and that the said certificate was afterwards, to wit, &c., laid before the said Lord High Chancellor, and was allowed and confirmed by him, according to the form of the statute, &c.; and the said R. S. Guinness further saith, that he did, &c., on, &c., duly make oath that such certificate was obtained fairly and without fraud, &c.; and that afterwards, to wit, &c., and on divers days between, &c., two parts in three in number and value of his creditors, who were such for not less than £20 respectively, and who proved their debts before the said E. B. and S. V., signed the said certificate, and testified their consent to the allowance of such certi-

ficate by the said. Right Hon. MAZIERE BRADY; and the said R. S. Guinness further saith, that the cause of action, &c., accrued, &c., before the time that he stopped payment, to wit, &c.; and this, &c., wherefore," &c.

To the first and second of the above pleas the Crown demurred generally, and also assigned certain causes of special demurrer; but neither the argument of Counsel nor the judgment of the Court turned upon the latter; and to the third plea a general demurrer, simply, was put in.

Mr. S. Ferguson (with whom was Mr. F. Fitzgerald), for the plaintiff, in support of the demurrers.

The substantial question is, whether the Crown is bound by the 33 G. 2, c. 14,\* and the 40 G. 3, c. 22.† We say that it is not; but the defendant contends that it is; and that is the defence

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\* By this statute (of 1759), after reciting that "the trade and manufactures of this kingdom are in a great measure carried on and supported by the means of promissory notes and accountable receipts given by bankers; and the credit of such bankers and the currency of their notes will be promoted by giving a more effectual security to the creditors of such bankers than they have at present;" and repealing the prior Act of 8 G. 1, c. 14, as to bankers and their creditors—it is enacted (section 7), "That the persons of all bankers who shall have stopped payment at any time between the 1st day of" the then Session of Parliament and the 15th of April 1766, and who at any time between the former date and the 1st of June 1760, "shall vest his whole real and personal estate, or a sufficient part thereof, in one or more trustees, for the payment of all their debts, and for defraying the expenses of executing that trust, shall be free from all arrests and executions at the suit of any of his creditors, until the 5th day of March 1762," &c.

Section 8.—"And be it further enacted, that from and immediately after the time that any banker shall abscond or conceal himself from his creditors, or stop payment, or die, all the real estate, whether for lives, in fee-simple, or fee-tail, and all the personal estate, credits and effects whatsoever, either in law or equity, of which such banker shall be seised, possessed of, or entitled unto, at the time of his death, or stopping payment, or absconding, or concealing himself from his creditors, shall be liable and subject to the payment of *all and every his debts, of what nature or kind soever the same be, without any regard to priority or preference in point of payment*, other than and except such debts and incumbrances as such banker had contracted before he became a banker, or shall contract before he becomes a banker, and other than and except such debts and incumbrances as shall be secured by deeds or conveyances registered" as prescribed by the second section, which "shall have the same force and effect, priority and preference, as if this Act had not been made."

† See following page.

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which he has raised in various forms by the first, second and third pleas. If the Crown be bound by these Acts, the defendant will be entitled to judgment on some or one of those pleas. The question

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Section 10.—“ Provided always, that where any banker or bankers . . . shall hereafter stop payment . . . and shall, within three calendar months next after such stopping of payment, by any deed or deeds, vest, or have vested his or their whole real and personal estates, or so much of his or their real and personal estates as shall be sufficient to pay all the debts that such banker or bankers owed, or shall owe at the time of the execution of such deed or deeds, and to defray all the expenses of executing the trust or trusts of such deed or deeds, in one or more trustee or trustees, for the payment of all the debts that were or shall be due at the time of the execution of such deed or deeds, to the bank or other creditors of such banker or bankers, such deed or deeds shall be valid and effectual to all intents and purposes; and that the estates real and personal granted, or to be granted by such deed or deeds, shall be and stand vested in such trustee or trustees, his or their heirs, executors and administrators, according to the several estates, rights and interests of such banker or bankers, *freed and discharged of and from his or their debts*; such debts only excepted as are by this Act entitled to a preference before other debts.” There follows a clause declaring that purchasers from the trustees shall hold “freed and discharged from any claim or demand of any creditor or creditors of such banker or bankers, except as aforesaid.”

† This Act (of 1800), after reciting the previous one of 33 G. 2, c. 14, ss. 7 & 8, and that no provision was made thereby for the security of the persons of such bankers as should after the said 5th day of March 1792 stop payment, and vest their real and personal estates, as aforesaid, from arrests, enacted (section 1), “That all and every banker or bankers who has or have stopped payment since the 1st day of April 1793, or who shall at any time hereafter stop payment, and who has, have, or shall have vested his or their whole real and personal estates, or a sufficient part thereof, in one or more trustee or trustees, for the payment of all his or their debts, and for defraying the expenses of executing that trust, pursuant to the said in part recited Act, *shall be from thenceforth for ever hereafter free from all arrests and executions at the suit of any of his or their creditors, and of and from all the debts contracted and owing by such banker or bankers, at the time he or they stopped or shall stop payment*; and in case any such banker shall afterwards be arrested, prosecuted, or impeached for any debt due before such time as he or they stopped or shall stop payment, such banker shall be discharged upon common bail, and shall and may plead in general that the cause of such action or suit did accrue before such time as he stopped payment, and may give this Act and the special matter in evidence; and the certificate of such bankers conforming, and the allowance thereof, according to the directions of this Act, shall be, and shall be allowed to be, sufficient evidence of his having been a banker and his stopping payment, and a verdict shall thereupon pass for the defendant, unless the plaintiff in such action shall prove that the said certificate was obtained unfairly and by fraud; provided that such banker shall not be entitled to the benefit allowed by this Act, unless the trustees in such deed named, or the major part of them, shall, in writing under their hands and seals, certify to the Lord Chancellor, or Lord Keeper, or Commissioners for the custody of the Great Seal of Ireland for

of form is therefore immaterial. As to the main considerations, however, it is a rule that Acts of Parliament which divest the King of any prerogative, right, title, estate or interest, do not in general extend to or bind him, unless there be express words to that effect: 19 *Vin. Abr. Stat.*, E, 10; *Bac. Abr. Prerog.*, E, 5; *Com. Dig. Parl. R.*, 8. In the Bankers' Acts there are no such words. The exceptions to the rule are, that the Crown is impliedly bound by statutes passed for the public good—the relief of the poor, the general advancement of learning, religion and justice; or to prevent fraud, injury or wrong: *Ibid*; *Chitty on Prerog.*, p. 383. The present case does not come within any of these exceptions. *The Queen v. O'Donnell* (a), and the cases mentioned there, have decided that the Crown is not bound by the Bankruptcy Acts, although made for the general benefit of trade: *a fortiori*, then, it is not bound by Acts like those relating to bankers, which have been passed for the benefit of persons engaged in a particular business. In the Insolvent Debtors Act (1 & 2 G. 4, c. 59, s. 48), the Crown is expressly referred to, and on that account has been held to be bound by that and a previous section (36).

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Mr. Hickey and Mr. Hamilton Smythe, for the defendant.

The Crown would be bound, even were the debt mentioned in the *scire facias* a Crown debt proper; still more so in a case such as

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the time being, that such banker or bankers hath or have in all things conformed himself or themselves according to the directions of the said Act of 23 G. 2; which said certificate shall be laid before the Lord High Chancellor, &c., in order for the allowing and confirming the same; and unless such banker make oath, or (being of the people called Quakers) solemnly affirm in writing that such certificate was obtained fairly and without fraud; and unless two parts in three in number and value of the creditors of such banker or bankers, who shall be creditors for not less than £20 respectively, and who shall have proved their debts before such trustees, or some other person by them respectively duly authorised thereto, shall sign such certificate, and testify their consent to such allowance and certificate."

The second section provides for the discharge from custody of any banker who shall have obtained and procured the allowance and confirmation of such certificate, but who "shall be taken in execution or detained in prison on account of any debt due or owing before he stopped payment, by reason that judgment was obtained before such certificate was allowed and confirmed."

(a) 6 Ir. Eq. Rep. 639; S. C., 1 J. & L. 271.

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the present, which is of a private nature (between subject and subject), and in which, so far as the Sovereign is concerned, nothing but the name is involved.

No doubt, it is a general rule that the Crown is not bound by a statute, unless it be expressly named; but the instances which are adduced in the books as exceptions open the door to great latitude of construction, and (to say the least) leave the rights of the Crown in a very unsettled state (*Dwarris*, p. 524). The authorities that support the rule are mostly taken from times in which the prerogative was highly favored; and the first decision on the subject with respect to bankrupts is one in which the Excise was concerned: *Rex v. Pixley* (a). The earlier cases on the general principle are collected in *Willion v. Berkley* (b); and at most they amount to this, that the Crown's prerogative, estate, right or title, shall not be barred by general words in a statute. In the *Magdalene College case* (c), the Crown was held to be included in the words "any person or persons, bodies politic or corporate;" and it was there said, that "the office of the Judge is to make such construction as will suppress the mischief and advance the remedy, and to suppress all evasions for the continuance of the mischief; and such, by way, shall never be left open by construction, although it be for the King's benefit" (d). Accordingly, in later instances the claim is only asserted thus—that the King shall not be divested of any of his prerogatives but by plain and express words for that purpose; though all his other rights are no more favored in law than the rights of his subjects: *Rex v. Archbishop of Armagh* (e). The sensible conclusion seems to be that, in the absence of those clear expressions, the Sovereign may be precluded of such inferior claims as might belong indifferently to him or to a subject (as the title to an advowson or to a landed estate), but not stripped of any part of his ancient prerogative, nor of those rights which are incommunicable, and are appropriated to him as essential to his regal capacity: *Dwarris on Stat.*, p. 524, citing *Wooddeson's Lectures*, pp. 31, 32. And any claim that the Crown could possibly have on

(a) Bun. 202.

(b) Plow. 223.

(c) 11 Co. 66 b.

(d) 11 Co. 71 b.

(e) 8 Mod. 8.

foot of a recognizance like the one now before us, is at best an inferior one—it might well be denied to it, without at all striking at its ancient prerogative, or the rights last referred to. Moreover, the 33 *G.* 2, c. 14, and the 40 *G.* 3, c. 22, come clearly (as we submit) within one of the long-excepted cases—being Acts designed in a particular and marked way to promote the public good. It is recited in the preamble of the former, that the trade and manufactures of this kingdom were in a great measure carried on and supported by means of promissory notes and accountable receipts given by bankers, and that the credit of such bankers and the currency of their notes would be promoted by giving a more effectual security to their creditors than they then had. These objects, therefore, were in part effectuated by the provisions of that Act; and the period within which it was to operate being comparatively brief, the defect was remedied by the 40 *G.* 3, c. 22, which extended to the present time the application of those provisions, as well as enlarged their scope. But what exactly do these Acts declare? What is their effect? Under the 33 *G.* 2, c. 14 (as thus extended in duration), the person of any banker who shall stop payment, and vest his property in trustees, as there directed, is declared to “be free from all arrests and executions at the suit of *any* of his creditors;” and that property, whether it remain so vested, or have passed to a purchaser from the trustees, is also exonerated “of and from his debts,” except such as he may have contracted before he became a banker, or are secured by registered instruments. The 40 *G.* 3, c. 22, goes further still; for it frees the banker “of and from all the debts contracted and owing” by him “*at the time*” he stopped payment; and in case he should be arrested for any such debt, directs his discharge upon common bail, and empowers him to plead in general terms, that the cause of action accrued before he stopped payment, and to give that Act and the special matter in evidence. Language could not well be more express—statutory provisions could scarcely be more pointed, to include a case like the present.

It has been sought to place the Acts relating to bankers on the same footing as those referring to bankrupts; and it is argued by Mr. *Ferguson*, that because the Crown has been held not to be

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bound by the latter, therefore it should also be exempted from the operation of the former. But *The Queen v. O'Donnell*, and the other cases that have been alluded to for this purpose, do not apply; there is no proper analogy between the two codes. We have seen what was the design and scope of the Bankers Acts; while the bankruptcy code, at least in its earlier enactments, both in England and Ireland, so far from tending to "the general benefit of trade," must have grievously discouraged it: 25 *Edw.* 3, c. 23; 34 & 35 *Hen.* 8, c. 4; 13 *Eliz.*, c. 7; 21 *Jac.* 1, c. 19; 11 & 12 *G.* 3, c. 8 (*Ir.*): and to give the same construction to the Bankers Acts as to those concerning bankrupts, and thus exempt the Crown from the effect of both, would not be to the relief of bankers, nor to construe as remedial the Acts relating to them. The 8 *G.* 1, c. 4 (*Ir.*), ss. 1 & 2, enjoined "all persons" to whom debts should become due, to proceed for their recovery within certain specified periods; and in *The Queen v. Bayley* (a), it was held that this statute did not extend to Crown bonds or recognizances; but the 7th section of it expressly saves to the King "all right, title and claim to any lands, tenements, rents, liens, mortgages, *recognizances*, debts, duties and demands whatsoever, as if the Act had never been made." And the decision of Lord St. Leonards in that case was mainly rested on that saving.

As to the second ground of defence, should the Court be of opinion that the Crown would not be bound by the Bankers Acts in regard to a Crown debt proper, we still contend that this exemption does not extend to a case in which the Crown is a mere nominal party, and its name has been made use of for the private purposes of a subject: *Ex parte Usher* (b); *Ex parte Dalton* (c); *Reilly v. Murphy* (d); *Tighe v. Walsh* (e); *Greaves v. D'Acastro* (f); *St. John's College v. Murcott* (g); *The King v. De Caux* (h); *Anonymous* (i); *Smith v. Pepper* (k). In England, a receiver's recognizance is not executed

(a) 4 *Ir. Eq. Rep.* 142.

(b) 1 *B. & B.* 197.

(c) 2 *Moll.* 442; 1 *Rose*, 366.

(d) *San. & Sc.* 488.

(e) 3 *Ir. Jur.* 251.

(f) *Bun.* 194.

(g) 7 *Term R.* 259, 264.

(h) 2 *Price*, 17.

(i) 1 *Law Rec.*, N. S., 21.

(k) 2 *Ibid.* 21, 24.

to the Crown at all, but to the Master of the Rolls and one of the Masters in ordinary. True it is, that in *The Queen v. Bayley*, Lord St. Leonards declined to apply the distinction for which we here argue; but that was because the 7th section of the Irish statute, on which same was decided, preserves to the Crown, as has been seen, all right and claim to any recognizances, debts and demands whatsoever. *Tighe v. Walsh* (a) was determined since *The Queen v. Bayley*. Lastly, by the 33 G. 2, c. 14, not only the creditors of bankers who became such before the latter entered upon the banking business, but also those whose demands are founded upon registered instruments, are expressly exempted from its levelling provisions, and the demands of all such made good to them in their original force, priority and preference. Had it, then, been the intention of the Legislature to place on an equally advantageous footing either the Crown, or those deriving under it by virtue of any recognizance, their claims would have been saved in like manner.

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Mr. F. Fitzgerald, in reply.

With respect to the general principle, that the Crown is not bound by a statute, unless it be expressly named in it, nothing further need now be said; and whether the reasons on which that principle was originally rested—whether the grounds on which it has been adopted—are or not any longer applicable, to their full extent, is a circumstance of but little moment. The rule has been too often recognised, and is established too securely, to be shaken here by any such consideration. The foundations of the law are not thus to be assailed. So, the distinction sought to be drawn by Mr. *Dwaris* between the “inferior claims” of the Sovereign and his “ancient prerogative and incommunicable rights,” may be (as he terms it) “a sensible conclusion;” but it is merely his own, and that of Mr. *Wooddson*. Nor is any claim resting on a recognizance executed to the Crown, for the benefit of a subject, at all one of an inferior character. In this country, such a recognizance has been always made to the Crown itself, instead of to a judicial officer of the Court of Chancery, as in England, and

(a) *Ubi supra*.

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does appertain to its ancient prerogative. "I am not bound," observed Lord St. Leonards, in *The Queen v. Bayley*, "to draw any distinction between debts due to the Crown for its own benefit, and those which are vested in it as a royal trustee. In the latter cases, the Crown is a trustee, certainly; but it becomes a trustee for public purposes, and in order to aid the administration of justice. In permitting recognizances to be acknowledged in its name, the Crown acts not for the benefit of particular persons, but for the benefit of the suitors in Courts of Equity, generally. It is considered conducive to the interests of the public generally, that the suitors in Courts of Equity should be enabled to use the name of the Crown, and have the advantage of its prerogative, to enforce payment of the moneys received for their use."

It has been suggested by Mr. *Hickey*, that the Bankers Acts come within one of the exceptions to the prevailing rule, because (as contended) they were designed in an especial manner to promote the public good; but the benefit of the community must be deemed the object of every statute; and so far from being particularly comprehensive either in their subject or scope, those that we are now considering are limited in both. The argument, founded on the general expressions contained in those Acts, assumes the question, and conflicts with the otherwise admitted principle. Mr. *Ferguson* has referred to the decisions upon the Bankruptcy Acts; and it is vain to deny their application to the still narrower code which is before us at present.

The latter may be more enlightened than the earliest of the other; but that is no reason why this Court should construe them differently. It is also a mistake to suppose that the judgment of Lord St. Leonards, in *The Queen v. Bayley*, turned upon the saving found in the 7th section of the 8th G. 1, c. 4. When first dealing with that case, his Lordship thus expressed himself:—"If I were to decide the point now, according to my present impression, I should say that this is not a case within the Act. I would decide that, not only on the ground that the statute is general in its terms, and therefore would not bind the

rights of the Crown ; but also because there is an express saving of the rights of the Crown in the last section." And upon a subsequent day, when pronouncing his decision formally, his language was, "If the saving did not exist at all, it is perfectly clear that the Crown would not be bound by the Act; and as that express saving has been introduced, it appears to me that there is no ground for argument."

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As to the remaining defence, *The Queen v. Bayley* also disposes of it; for on the same occasions the Lord Chancellor further observed:—"I do not think there is any distinction between cases in which the Crown is beneficially interested, and those in which, as it is said, the Crown is but a royal trustee . . . . There is no reason for saving the rights of the Crown to the one class, which does not equally apply to the other. . . . : I have read the authorities that have been referred to for the purpose of showing that this Court has recognised the distinction contended for; but they do not appear to me to have any bearing on the the subject. In *Ex parte Usher*, what fell from the Court has no reference to the present question; it merely amounts to this, that the debt due there was not a public debt. Then it is said that a discharge under the Insolvent Act is a bar to Crown debts of this description; but whether that be so, or not, must depend on the Insolvent Act itself, with which I have nothing to do in the present case; but it does not in any way affect the question whether such debts are within the operation of the Act which I have now to consider. The same observation applies to all the cases which have been cited for the purpose of establishing that such a distinction exists." If there be not in the Bankers Acts an express saving of the Crown's rights, or those claiming under it, none was necessary. First principles do not require the confirmation of the Legislature.

THE LORD CHANCELLOR.

I have attentively considered this case, and examined the statutes relating to the subject. They are the 8th G. 1, c. 14, the 33rd G. 2, c. 14, and the 40th G. 3, c. 22. All are *in pari materia*;

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and I have come to the conclusion that they are not Acts which bind the Crown. In *The Queen v. O'Donnell*, Lord St. Leonards held that the Bankruptcy Acts did not bind the Crown. He arrived at a different conclusion upon the Insolvent Debtors Act, 1 & 2 G. 4, c. 59, on account of the special provisions which it contains. In design, the Bankers Acts nearly resemble those referring to bankrupts, as their principal object is to prescribe a mode of winding up the affairs of bankers who have become embarrassed in their circumstances—trustees being appointed for that purpose, in the same way as recourse is had to commissioners under the other code; and upon complying with the proper conditions, the banker obtains a certificate very similar to that given to a discharged bankrupt.

As to the general principle, it is very clear, and has prevailed for a long period. The rule is referred to in the argument of Mr. (now Justice) Crampton, in *The King v. Wright* (a), where he cites the following passage from *Com. Dig. Par. R. 8*:—  
 “Generally, the King shall not be restrained of a liberty or a right which he had before, by the general words of an Act of Parliament, if the King be not named in the Act.” He also quotes from *Bac. Ab. Prerog.*, E, 5, in which it is said:—  
 “Where a statute is general, and thereby any prerogative, right, title or interest, is divested or taken from the King, in such case the King shall not be bound, unless the statute is made by express words to extend to him.” Now, these words, “any prerogative, right, title,” &c., are very extensive; and I apprehend there can be no question but that, as a general rule, where an Act of Parliament would entrench upon the prerogative of the Crown, it will not be binding upon the Crown, unless it be expressly named. There are exceptions, however, to this rule; and they are thus stated, in 5 Co., 14 B:—“In divers cases the King is bound by Act of Parliament, although he be not named in it, nor bound by express words; and therefore all statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the King, although

(a) 1 Ad. & El. 437.

he be not named." No doubt, the expressions, "to suppress wrong, or take away fraud," are general and wide; but I do not consider that the Bankers Acts fall within them. The mere circumstance of an Act having been passed for the general public good, will not make it binding upon the Crown. This is shown by *The King v. Osbourne* (a). In my opinion, therefore, it cannot be fairly contended that the Crown is bound by the Bankers Acts, by reason of their object: nor do they contain any particular words which should give them that effect; for it would require clear expressions to warrant the Court in holding that the Crown was bound. The terms employed in 33 G. 2, c. 14, s. 8, are, "all and every his (the banker's) debts, of what nature or kind soever;" and those used in the 40 G. 3, c. 22, s. 1, are very much to the same effect. Yet the Crown is not named; and in the Bankruptcy Act of 6 & 7 W. 4, c. 14, still stronger words are to be found. Seeing, then, that the Bankers Acts are similar in their scope to those relating to bankrupts, and finding that they are not within the general class of excepted statutes, and that there are no special words binding the Crown, or even showing that, in order to work out the Acts, the Crown should be bound, I cannot hold that it is; and on the contrary, I must decide that they do not prevail against the Crown.

The question then arises, whether the debt secured by the recognizance (the subject of the pleas) is merely a private one, and stands on a worse footing than a debt due to the Crown itself, as has been argued by Mr. Guinness' Counsel. If the Crown, as the fountain of justice, thought it proper, in a case like the present, to lend its name and prerogative to the security, by requiring the recognizance to be executed to itself, it was surely intended that the benefit of it should be worked out by all the aids of that prerogative. The Crown, in fact, declares that the prerogative shall be available for the purpose of realising the demand. I do not see, then, why it should not be fully enforced; and in this country, from the earliest times, receivers' recognizances have been taken in the same form. I think it unnecessary to go into the

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(a) 6 Price, 94.

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older cases on the subject, because I conceive that *The Queen v. Bayley*, decided by Lord St. Leonards, settles the law. I do not consider it to be my duty to recast that decision. On the contrary, I entirely concur in it, and hold that there is no sound distinction between the prerogative, as exerciseable for the benefit of the subject, and of the Crown. There is no policy which requires—no practice that sanctions any such distinction; and the Courts of Law do not recognise it. In *Rex v. Fenton & Motherwell (a)*, it was held, that after execution had issued, and been levied upon a judgment on a receiver's recognizance in Chancery, the Court of King's Bench would not inquire whether the suit, though in his Majesty's name, was really for the benefit of a subject; being concluded by the record, from which it appeared to be the King's. In England, a proposition analogous to that which is relied on by the defendant here was contended for, in *Regina v. Chambers and others (b)*. There, a *scire facias* had issued against the defendants, for breach of the condition of a bond given by them to the Crown, on the appointment of Chambers (who became bankrupt subsequently) as committee of the estate of a lunatic, for the due discharge of his duties and passing of his accounts; and Serjeant Manning having moved, on the part of Chambers' assignee, for a rule to show cause why the *scire facias*, and the judgment thereon, should not be set aside—contending that such a bond was not within the statute 33 *Hen. 8*, c. 39, s. 50, so as to entitle the Crown to treat it as a matter of record, and have a *scire facias* upon it—Lord Abinger inquired, "Are you aware of any difference between debts due to the Crown, because the Crown represents public interests, and debts due to the Crown by virtue of its prerogative? The only question has been, whether the prerogative, which is the foundation of all these rights, should be applied to debts due by virtue of Acts of Parliament made for the benefit of the public; but there is no difference in the process." To this it was replied, just as has been argued before me, that the case seemed to be a third one, in which neither the Crown

(a) S. & B. 40.

(b) 11 M. & W. 776.

was personally concerned, nor the public interests involved. It was held, however, that the Crown was entitled to treat the bond as a matter of record, and have a *scire facias* thereon. The rule was therefore refused. I conceive, then, that when such a bond or recognizance has been once given, all the rights of the prerogative flow from it; and looking at this and the other authorities which I have mentioned, as well as considering the question on general grounds, the demurrers that have been taken to the pleas in this case must be allowed.

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*Chancery.*  
THE QUEEN  
v.  
GUINNESS.  
*Judgment.*

SMITH

v.

THE DUBLIN AND BRAY RAILWAY COMPANY.\*

June 9, 10.

THE cause petition prayed that the Dublin and Bray Railway Company might be declared to be bound by the service of the notice to treat for the purchase of a piece of ground, and by the contract made with petitioner by their agents; and might be ordered specifically to perform and carry into execution said contract—petitioner offering to do so on his part—and that the Company might pay to him the sum of £150 in the petition mentioned, with interest; petitioner being willing thereupon to execute to the Company a proper conveyance of his reversionary interest in the land; and, if necessary, that the Company might be ordered to affix to said agreement their corpo-

A Railway Company served a notice to treat for the purchase of land; and persons in their employment, who either were, or acted as if they were, authorised to arrange on the price, obtained the vendor's signature to a printed form of agreement fixing the sum.

*Held*—that the Company were bound to specifically perform this agreement, though not signed by them under their corporate seal.

*Semble*.—An award made after the date of said agreement, and under the vendor's protest, by the arbitrator appointed pursuant to 14 & 15 Vic., c. 70, was a nullity.

*Semble*.—Had the price to be paid for the land been ascertained by parol only, after service of the notice to treat, the contract would still have been binding.

\* *Ex relatione* ALFRED M'FARLAND, Esq.

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*Chancery.*

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*Statement.*

rate seal, and to deliver to him a duplicate thereof so sealed, in order that he might proceed thereon at law, in case the Court should so desire.

It appeared by the petition that the petitioner was seised of the reversion, on a lease of part of the lands of Miltown. That under certain Acts of Parliament, the Company being entitled, and requiring, to take eight perches of the petitioner's ground for the purposes of their railway, caused their secretary, under the name and description of the Company, to serve upon petitioner a notice, pursuant to the provisions of the said Acts, dated the 28th of May 1849, and requiring petitioner to treat for those eight perches. That he did, in compliance with such notice, immediately treat with the solicitors of the Company, and with J. J. Byrne, to whom he was referred by the former as the authorised agent of the Company, for the purchase, and for agreeing as to the purchase-money. That the petitioner furnished the particulars of his title at the proper time, and afterwards received from the Company a notice signed by their secretary, informing him that they were desirous to agree with him for the purchase, offering him £60, and apprising him of an inquisition in case he should refuse such offer, &c. That within ten days, and upon a treaty had between the petitioner, Byrne, and one Huthwaite, a clerk of the said solicitors, the petitioner agreed to accept, and the Company, by those agents, agreed to give to him £150 as such purchase-money. That the Company, by their solicitors, as represented by that clerk, and in the office of Byrne, then filled up a printed form of agreement, which (petitioner charged) was prepared by those solicitors on behalf of the Company, for the purpose of securing to the latter the lands, and of binding petitioner to convey his interest therein, for the price so agreed on; and Huthwaite, on the Company's behalf, required petitioner's signature thereto, which he accordingly affixed, and delivered the agreement to the other, who accepted it for the Company; and the contract, as thus signed, had been ever since acted on by petitioner.

That on the 9th of July 1852, petitioner received a notice, signed by the Company's solicitors, and apprising him that the arbitrator appointed by the Commissioners of Public Works, pursuant to a

statute passed in the meanwhile, would view the lands in question, and adjudicate upon their value. That this notice was the first intimation which petitioner received of the Company's intention to repudiate or evade his previous agreement with them for the purchase of the premises; and that on the 20th of July, petitioner attended before the arbitrator—mentioned the existence of the agreement, and protested against his assuming any power to inquire into the value of petitioner's interest in the ground—insisting that same had been conclusively settled by said agreement. That (notwithstanding a second protest by petitioner) in the course of a few days the arbitrator adjudicated on the matter, and awarded a sum of £50 to be payable to petitioner for the purchase of the premises. The petition then submitted that the arbitrator had no jurisdiction to make any such award, and that the Company could not rescind or invalidate said agreement without his consent.

By the affidavit in answer, made by the secretary to the Company, Byrne, and Huthwaite, jointly, the service of the notice to treat was admitted. It was also conceded that, in pursuance thereof, a treaty was entered into between petitioner, and Byrne and Huthwaite; and that the two last were on that occasion acting on behalf of the Company; but it was denied that they were authorised, and alleged, on the contrary, that they had no right whatever to enter into any final or conclusive agreement with the petitioner—as it was said to be the invariable custom of the Company, when about to treat for the purchase of land, to authorise their surveyors and solicitors, or one of their assistants, to go to the vendor, and endeavour, if possible, to effect an amicable agreement as to the amount to be paid for the purchase-money; that in the event of an arrangement, the vendor was to sign the usual printed form of agreement to sell to the Company, for the sum fixed on—it being, however, expressly understood that such agreement was not be conclusive or binding upon the Company until approved of by their Board of Directors, and the Company's seal affixed thereto. That upon the treaty with petitioner, such practice and custom were adopted, and petitioner was informed that the agreement then come to was of that nature. Other statements to the like effect were

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 v.  
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 RAILWAY.  
 ———  
*Statement.*

introduced (but these were met by contradictory allegations contained in an affidavit subsequently filed by the petitioner). It was then stated that in June 1849, the agreement, as signed by petitioner, was laid before the Board for their approval, but that they refused to ratify, and returned it to their solicitors. And it was submitted, lastly, that as the seal of the Company had never been put to the agreement, it was not binding upon the Company, and that they were not liable to carry the same into execution.

*Argument.* Mr. Serjeant *Christian*, Mr. *Fitzgibbon* and Mr. *H. Ormsby*, for the petitioner, argued—first, that the service of notice to treat, and the printed form of contract signed by him, coupled with the acts of the Company, their solicitors and other agents, constituted in themselves a valid and complete agreement, of which the Court would decree the specific performance; and if not, then secondly, that the Court would either order the Company to make the agreement perfect, by affixing their corporate seal to it, for the purposes of an action to be brought by the petitioner to recover the £150 mentioned therein, or would restrain the Company from raising any objection at the trial of such action, grounded on the absence of that seal. The award of the public arbitrator was a mere nullity. Counsel cited *Walker v. Eastern Counties Railway Co. (a)*; *Doherty v. Waterford and Limerick Railway Co. (b)*; *The Wardens, &c., of the Fishmongers' Co. v. Robertson (c)*; *Adams v. London and Blackwall Railway Co. (d)*; *Inge v. Birmingham, Wolverhampton and Stour Valley Railway Co. (e)*; *Blount v. Great Southern and Western Railway Co. (f)*; *Rex v. Hungerford Market Co. (g)*; *Munroe v. Newry, Warrenpoint and Rostrevor Railway Co. (h)*.

Mr. *Martley*, Sir *Colman O'Loghlen* and Mr. *W. F. Darley*, for the respondents, quoted *East London Water Works Co. v. Bailey (i)*; *Shelford on the Law of Railways*, p. 81; *The Mayor*

(a) 6 Hare, 594.

(c) 6 Scott, N. R., 56.

(e) 21 Law Times, 123.

(g) 1 Nev. & Man. 112.

(b) 13 Ir. Eq. Rep. 538.

(d) 2 M. & G. 118, 129.

(f) 2 Ir. Chan. Rep. 40.

(h) 2 Ir. Chan. Rep. 260, 263.

(i) 4 Bing. 283.

of *Ludlow v. Charlton* (a); *Finlay v. Bristol and Exeter Railway Co.* (b); *Adams v. London and Blackwall Railway Co.* (c); and they distinguished, from the present case, *Munroe v. Newry, Warrenpoint and Rostrevor Railway Co.*; as the respondents in the latter had expressly waived all objection to the agreement there, as not having been under the Company's seal.

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*Chancery.*  
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*Argument.*

THE LORD CHANCELLOR.

The principle which is mainly contended for, on the part of the petitioner in this case, may be somewhat novel; but I conceive that he is entitled to have the agreement upon which he relies specifically performed by the Company, though it is not under their corporate seal. What are the leading circumstances? The Company served the ordinary notice on the petitioner, and thus declared that they were willing to treat with him for the purchase of his land. There then remained nothing to be done but to settle the amount that was to be paid; and the question is, can that, according to law, be determined between a Railway Company and a person so circumstanced as the petitioner, in any other manner than by a document under the seal of the Company? for if not, there is an end to all further inquiry. But is it consistent with reason, and the ordinary dealing in such cases, that the agreement must have the Company's seal to it? or is such a proposition established by authority? In general, Companies of this class do not act by their directors in the valuation of property which they seek to purchase. They act either by particular agents, skilled in such matters, or through the intervention of a jury. In the former case, it is but reasonable that they should be bound by the agreements of those whom they have so delegated, whether their own seal be attached to those agreements or not: while in the latter case, the parliamentary proceedings for summoning a jury, and going before it, do not require any document, that I am aware of, to be under the seal of the Company; and, supposing a jury to be summoned, the

*Judgment.*

(a) 6 M. & W. 815, 823.

(b) 7 Exch. Rep. 409.

(c) 2 M.N. & G. 132.

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*Chancery.*  
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*Judgment.*

parties assembled, and the amount to be given as compensation assessed, it could not be contended that the Company was not bound by those proceedings, on account of the absence of any writing under their seal. So far as authority goes, I apprehend it must be concluded from all the cases, that it is *not* necessary that the seal of the Company should be affixed to an agreement for purchase, made after the service of the notice to treat. That is to be inferred from *Walker v. The Eastern Counties Railway Company*, and *Adams v. The London and Blackwall Railway Company*. It is true, that a corporation cannot, in general, contract otherwise than under seal; but it may be authorised to do so by the object, scope or terms of the Act of Parliament under which it is incorporated. An exception to the general principle also prevails, whenever to hold the rule applicable would occasion great inconvenience, or tend to defeat the object for which the corporation was created. Thus, the performance of acts that are of very frequent occurrence, or of too general or insignificant a nature to compensate for the trouble of affixing the common seal, are established exceptions. In the case before me, the notice to treat is not under the Company's seal, and it has not been argued that it ought to be. Then why should the agreement, that was consequent upon it? Why should the former, though signed by the secretary only, be held binding on the Company, and a seal be required for the latter? If the agreement stood by itself—if it were not consequential on a notice to treat, and dependant on that for support—the argument founded on the circumstance of *its* not being under seal might perhaps be relied on; but there was a regular notice to treat; and even had the price not been fixed on by the printed form, which the Company's agents were in the habit of using, and which the plaintiff signed at their instance, but had rested in parol only, there would still, in my opinion, have been a binding contract. Therefore, even if that form were not binding on the Company at all, because not under their seal, that would fall far short of deciding the question; if there had been no such document in existence, and if the Company's agents were authorised to fix the price with the petitioner, and did so,

that, coupled with the notice to treat, would have been a binding contract. There would have been no occasion for any second document.

[His Lordship then referred to the particular facts of the case, to show that the Company's agents either had, or led the petitioner to suppose that they had, authority to arrange the price; and continued]—For these reasons, I conceive that the petitioner is entitled to a decree, with costs, according to the first alternative in the prayer of his petition. It is unnecessary, then, to consider the second.

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*Judgment.*

*Reg. Lib. Gen., 9, fol. 77.*

And see the *Attorney-General v. Ball* (10 Ir. Eq. Rep. 146), and the cases cited there.

CARBERY v. COX.

1852.

April 20, 22.

THE Master, by his report in this cause, found that Richard Keatinge, by his will, bearing date the 8th of January 1844, bequeathed the sum of £20 yearly to the monks of Shandon, near Dungarvan, to provide clothing for the poor children attending their school; the like sum of £20 yearly to the nuns of Dungarvan convent, to provide clothing for the poor children attending their school; and the sum of £20 yearly to the parish priest of Dungarvan, to defray the expenses of an organ and organist in the chapel of Dungarvan; the sum of £20 to Michael Cox, senior, during his life, and after his decease, to the monks of Mount

Bequest of an annuity to the monks of S., to provide clothing for the poor children attending their schools—*Held* to be valid.

*Held also*, that the bequest showed a general charitable intent, which the Court would effectuate, though the

school should be accidentally discontinued, or should cease to answer the very description of it in the will.

Bequest of an annuity to the parish priest of D., to provide for the expense of an organ and organist for the chapel of B. :—*Held*, valid.

A testator bequeathed an annuity to the monks of M., to be appropriated to the improvement of the chapel of M. The abbot of M., at the time of the testator's death, died :—*Held*, that his successor had no right to the annuity, and that there was no general charitable purpose for which a scheme should be directed.

1852.  
*Chancery.*  
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 v.  
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*Statement.*

Melleray, near Cappoquin, to be appropriated for the improvement of the chapel of Melleray; the sum of £20 yearly to his relative Mrs. Bridget Colbert, and after her death to the monks of Shandon. The Master further found that the defendant James Francis Broderick was the principal of the monks of Shandon and Dungarvan, in the said will referred to; and that the defendant Margaret M'Grath was the abbess of the Dungarvan convent, in the said will also mentioned; that the defendant the Very Rev. Jeremiah Hally was the parish priest of Dungarvan; and that the Very Rev. Matthew Joseph Ryan was the successor of the Very Rev. Michael Vincent Ryan, deceased, and was the abbot and principal of the monks of Mount Melleray, in said will referred to; and that the said James Francis Broderick, Margaret M'Grath, Jeremiah Hally and Martin Joseph Ryan, respectively claimed to be entitled to the several annuities, as well present as contingent, which by said will were bequeathed to the monks of Shandon, the nuns of Dungarvan convent, the parish priest of Dungarvan and the monks of Mount Melleray, near Cappoquin.

Exceptions were taken to the Master's report, whereby it was submitted that the Master should have found that the legacies to the monks of Shandon were void and inoperative, same being given to a body not recognised by law, and incapable of taking the same; or that he should have found no devise or legacy in respect of the same; and that there was no evidence before the Master of any such legal body being in existence as the monks of Shandon, or no sufficient evidence to sustain the finding.

An exception was also taken to the finding, that the Master should have found that all the said annuities were devised and bequeathed for the lives and life of the persons and person to whom the same and each of them respectively were devised and bequeathed; or that he should have found that the same, and each of them, were respectively only for the life and lives of the person or persons answering the characters in said will, designated at the execution of the said will.

Mr. *Brewster* and Mr. *F. Fitzgerald*, in support of the exceptions, relied on the 28th, 29th, 33rd and 34th sections of the 10 G. 4, c. 7 (Catholic Relief Act), and the 7 & 8 Vic., c. 97, s. 15, showing that the existence of monks as a body was not recognised by law, even since the passing of that Act; and they cited *Mills v. Farmer* (a); *Corbyn v. French* (b); *Attorney-General v. Goulding* (c); *Attorney-General v. Whitechurch* (d); *Cherry v. Mott* (e); *The Attorney-General v. The Bishop of Chester* (f); to show, that if the bequest was void, the Court would not execute it *cy pres*, as there was no general charitable intent.

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Chancery.  
 CARBERRY  
 v.  
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 ———  
 Argument.

Mr. *Deasy* and Mr. *Robert Ferguson*, contra, argued that a bequest such as this was valid before the Catholic Emancipation Act: *Commissioners of Charitable Donations v. Walsh* (g); *Read v. Hodgins* (h). That the Act had recognised the existence and legality of religious communities, subject to restrictions. That there was here a trust for a charitable purpose, which the Court would carry out *cy pres*, although the devisees were incapable of taking: *Attorney-General v. Stephens* (i); *Incorporated Society v. Richards* (k); *Attorney-General v. Baxter* (l); *Moggridge v. Thackwell* (m); *Attorney-General v. Pearson* (n); *Attorney-General v. Vivian* (o). That the bequest for the improvement of the chapel was valid, as intended for benefit of the Roman Catholics of the district.

The *Attorney-General*, on behalf of the Crown, declined to take any part in the discussion.

(a) 19 Ves. 483.

(e) 2 Br., C. C., 128.

(c) 1 M. & Cr. 123.

(g) 7 Ir. Eq. Rep. 34 (note).

(i) 3 M. & K. 347.

(l) 1 Ver. 248.

(n) 3 Mer. 353.

(b) 4 Ves. 418.

(d) 3 Ves. 141.

(f) 1 Br., C. C., 444.

(h) 7 Ir. Eq. Rep. 17.

(k) 1 Dr. & War. 258.

(m) 7 Ves. 36.

(o) 1 Russ. 226.

1852.  
*Chancery.*  
 CARRERY  
 v.  
 COX.  
 April 22.  
 Judgment.

The LORD CHANCELLOR.\*

This case stood over, in order that I might consider the effect of three bequests in the will of Richard Keatinge. Two of them are bequests of annuities to the monks of Shandon, to provide clothing for the poor children attending their schools.

The first of them is an immediate bequest; the second is rever-  
 sionary, to take effect on the death of Bridget Colbert. The Master's report finds that James Francis Broderick, a defendant in the cause, is the principal of the monks of Shandon. It was objected that, as I could not give effect to a bequest to monks, nor recognise them as having schools, the bequest was altogether void. In support of this argument, Mr. *Fitzgerald* relied on the case of the *Attorney-General v. Goulding* (a), and other cases, containing the same doctrine. They, however, do not appear to me to govern the case before me; for, connecting the finding, that Mr. Broderick was the principal, and, as I must infer, known to the testator to be the principal officer or member of this community, I think he is to be considered as the person, or at least as one of the persons, described, and consequently that the school kept by him, and the children who should attend it, were those in the contemplation of the testator. I, therefore, see no difficulty in paying to him, and to any of the persons who at the testator's death were members of this body, the annuities for the charitable purposes intended; who those other members were, and whether now alive or not, I must make matter of inquiry. As soon, however, as those persons shall all have died, there will be no one to execute the trust—indeed, there will no longer be a school answering the description in the will, but the charitable intention will not then have ceased: this is so plainly indicated as to leave no doubt that poor children of the vicinity attending school were to be permanent recipients of the testator's bounty. The accidental discontinuance of the school, or its ceasing to answer the very description given of it in the will, is no reason whatever for refusing to effectuate the charitable purpose of the testator. For this there is abundant authority, and I shall refer to two cases which, though

(a) 2 Br. C. C. 128.

\* Right Hon. FRANCIS BLACKBURNE.

not exactly in point, are full authority for this position: *The Incorporated Society v. Price* (a), and *Hayter v. Trego* (b). I must, therefore, ascertain who were the individuals described as the monks of Shandon, at the time of the testator's death—direct payment of the annuities to them, and refer it to the Master to approve of a scheme and trustees for the administration of the charity, to take effect on the death of the survivor of them.

The next question relates to the bequest of an annuity to the monks of Mount Melleray, to be appropriated to the improvement of the chapel of Melleray aforesaid, and the lands belonging thereto. The finding as to this is, that the defendant the Rev. Mathew Joseph Ryan, who is the successor of the Very Rev. Michael Vincent Ryan, deceased, is the abbot and principal of the monks of Mount Melleray. From this I infer that since the death of the testator, Michael Vincent, who was then the abbot or principal, has died; so that I cannot recognise any right in his successor, neither can I discover any general charitable purpose that can authorise the Court in directing a scheme. The case, therefore, seems to me to be one in which there is but one particular object; and as that cannot be answered, the residuary legatee must take. This view of the case seems to me to be borne out by the principle acted on in the case of *Whately Church*, mentioned in the *Attorney-General v. Hurst*, in 2 *Cox*, p. 364.

Declare the annuity of £20 per annum to the nuns of Dungarvan a valid charge, and decree the payment of the arrears and accruing gales thereof out of the personal estate of the testator, as the fund primarily liable thereto respectively. Declare the annuity of £20 per annum to the parish priest of Dungarvan a valid charge, and decree the payment of the arrears and accruing gales thereof out of the said personal estate of testator, as the fund primarily liable thereto. As to the bequest of an annuity of £20 per annum to the monks of Shandon, and also as to the bequest to them of a further like annuity of £20 in reversion expectant upon the death of Mrs. B. Colbert, overrule the

1852.  
Chancery.  
CARBERRY  
v.  
COX.  
Judgment.

(a) 1 Jo. & Lat. 498.

(b) 5 Russ. 113.

1852.  
*Chancery.*  
**CARBERRY**  
*v.*  
**COX.**  
*Judgment.*

exceptions of Augustine Cox, and declare said present and reversionary annuity, so far as the charitable purpose thereof, well charged upon the said personal estate of the testator, as the fund primarily liable thereto; and direct that during the life and lives of James Francis Broderick, Bartholomew Joshua Sullivan and Michael Ignatius Sullivan, and the survivors and survivor of them, being the persons who, with Patrick Hughes, deceased, were the persons answering the description of the monks of Shandon, at the time of the death of testator, the said annuities and all arrears thereof be paid to said persons, and the survivor of them, for the aforesaid charitable purpose, with liberty, upon the death of the survivor of them, to have a scheme applied for. As to the annuity to the monks of Mount Melleray, allow the exceptions, and declare said annuity invalid and void.

*Reg. Lib. Gen. 5, f. 345.*

### MILLINGTON *v.* THOMPSON.

July 10, 12.

An acknowledgment of a judgment debt in the will of the debtor is sufficient to take it out of the operation of the Statute of Limitations (3 & 4 W. 4, c. 27, s. 40.)

THOMAS MILLINGTON obtained two judgments against the Rev. Richard Wynne, for £1000 each, which were vested in Hannah Hardell as a trustee for the petitioner. On the 27th of January 1822, the Rev. Richard Wynne gave his bond to the said Thomas Millington for £500. Thomas Millington died in 1826, and administration with the will annexed was granted to the petitioner, who also obtained a judgment against the Rev. Richard Wynne for £923. 1s. 6½d., in Easter Term 1827. The Rev. Richard Wynne made his will, bearing date the 14th of July 1835, duly signed and attested, as follows:—

“Whereas I have some time back instituted a suit, which is now

pending in the Court of Chancery in Ireland, wherein I am plaintiff, and William Dix and George Davies Dix, Esqrs., are defendants; and whereas the said defendant William Dix holds, among other things, a policy of insurance for my life, for the sum of £3000, current money of Great Britain, effected with the Equitable Society for Insurance of Lives and Survivorship—said policy being numbered 19,864; now, my will and desire is that such suit shall be prosecuted by my executors hereinafter named; and in the event of my executors succeeding in such suit, that they shall pay the following persons hereinafter named, out of said policy, and any addition that may be made thereto, in full of all demands thereon; that is to say:—To Thomas Millington, of Lower Temple-street, builder, the sum of £1000 British; to J. Hamilton, £684. 11s. 9d., and to the Rev. W. Hearn, £172. 3s. 6½d., in full for their several debts, provided they act as executors; otherwise to remain on the footing of other creditors.”

1852.  
*Chancery.*  
MILLINGTON  
v.  
THOMPSON.  
Statement.

By the final decree, made on the 22nd of January 1852, in the cause of *Wynne v. Dix*, the respondent, who was administrator of the Rev. Richard Wynne, was declared entitled to a considerable fund. The cause petition in this matter was filed shortly afterwards. It prayed an administration of the personal estate of the Rev. Richard Wynne, and that the fund might be transferred to this matter. The only question was, whether the petitioner was barred by the Statute of Limitations, 3 & 4 W. 4, c. 27, s. 40?

Mr. *Hughes* and Mr. *F. W. Walsh*, for the petitioner, contended that the clause in the will above stated amounted to an acknowledgment, sufficient to take the case out of the statute. It was signed by the debtor, and must be construed to be to the creditor, as it was made for his benefit. They cited *Hill v. Stawell* (a); *Barrett v. Birmingham* (b); *Sugden's Essay on the Real Property Statutes*, pp. 131, 132; *Williamson v. Nayler* (c); *Phillips v. Phillips* (d); *Clinton v. Brophy* (e).

Argument.

(a) 2 J. & S. 389.

(b) Fl. & K. 564; S. C. 4 Ir. Eq. Rep. 537.

(c) 3 Y. & Col. 208.

(d) 3 Hare, 281.

(e) 10 Ir. Eq. Rep. 139.

1852.  
*Chancery.*  
 MILLINGTON  
 v.  
 THOMPSON.  
 ———  
*Argument.*

Mr. *F. Fitzgerald* and Mr. *Wynne*, contra.

The acknowledgment must be given to the creditor; and it must be absolute and unconditional, and with a view of making the party giving it liable to the demand. It is impossible to give that interpretation to a will, which, if it be an acknowledgment at all, is one to a third party, and which is revocable up to the testator's decease. If it be not an acknowledgment at the time it is given, it cannot be made one by the subsequent death of the testator: *Jones v. Scott* (a); *Freake v. Cranefeldt* (b); *Evans v. Tweedy* (c); *Blair v. Nugent* (d).

July 12.  
*Judgment.*

THE LORD CHANCELLOR.\*

I do not think that it is necessary for me in this case to review the authorities that have been cited, or to dissent from any of them, in order to arrive at a satisfactory decision of the question before me. That is, simply, whether there has been an acknowledgment of the existence of the debt, in writing, signed by the debtor, and given to the creditor? That the debtor has signed such an acknowledgment cannot be denied; but it is contended that it was not given, and could not have been given, to the creditor, because it is contained in the will of the debtor. I apprehend that it is impossible, with reference to the judicial and other opinions that have been given on this provision of the statute, and to its plain and obvious policy, to hold, that the document signed must be such as to be capable of manual delivery. An insolvent's schedule, or a Master's report, is a matter of record, that never can be given in the sense which the defendant's Counsel contend that this word is used in the statute. Its sense manifestly is more extensive; and, in my opinion, it means any document signed by the debtor, expressive of his intention to admit the debt, and to have it produced and used for that purpose. A will which must be published at the testator's death, which must be signed, and must be accessible to the creditor, satisfies every imaginable end that we can attribute to the Legis-

(a) 4 Cl. & Fin. 382.

(b) 3 M. & Cr. 499.

(c) 1 Beay. 55.

(d) 3 Jo. & Lat. 672.

\* The Right Hon. F. BLACKBURNE.

lature. As a recognition of the debt, it is just as significant as an insolvent's schedule; and the intention of the debtor, that the creditor shall have notice, is just as unequivocal in the one case as in the other. Indeed, in the case before me, the very special provision made for the plaintiff's and two other debts, and the condition respecting the executors, must have made it absolutely imperative on the person who had possession of the will to place it in the hands of these three persons at the testator's death, or at all events to give them the earliest intimation of its contents. Besides which, the rules of the Ecclesiastical Court made it impossible that the will could be proved unless the executors appeared or were cited. It is plain, therefore, to my mind, that the testator, when he signed the will, recognising the debt, must have intended that it should be given, that is, actually delivered to the creditors, to be used as evidence of their debt, and to facilitate its payment.

1852.  
*Chancery.*  
MILLINGTON  
v.  
THOMPSON.  
*Judgment.*

In re LINDSAY.

THIS was a petition, by way of special case, filed under the 11th section of the Court of Chancery (Ireland) Regulation Act, 1850. The case stated in the petition was the following:—

Thomas M'Murray, being possessed, among other property, of eight shares in the Northern Banking Company, and of ten shares in the Belfast Banking Company, made his will on the 25th of July 1840, by which he left all the property, real and personal, which he might be possessed of or entitled to at the time of his death, to William Hopkins, David Lindsay and William M'Clelland, upon trust as to the Bank shares, in case of his wife Margaret M'Murray "having a child after my death, I leave to that child eight shares I have in the Northern Bank, and ten shares in the Belfast Bank."

Dec. 15.

A testator, by his will, made in 1840, in case of his wife having a child after his death, left to that child eight shares he had in the N. Bank, and ten shares in the B. Bank.—*Held*, that three children born after the will, and before the testator's death, were entitled to the shares.

*White v. Barber* (5 Bur.) approved of.

1852.  
*Chancery.*  
*In re*  
 LINDSAY.

—  
*Statement.*

And after various bequests, he directed all his other property to be disposed of by auction, and divided between his son William and his daughter Anne.

The testator died on the 4th of September 1849, leaving William and Anne—children of a former marriage, and Andrew M'Clelland, the son of Jane, who was also a child of the same marriage—and Thomas, George and Edmond, children by his second wife Margaret M'Murray—all born before his death. No child was born after his death. Anne M'Murray died shortly after the testator's death, intestate and unmarried. The executors proved the will, and administered all the assets, except the Bank shares; with respect to which the following claims were made:—William M'Murray claimed them as residuary legatee; Thomas, George and Edmond claimed them under the bequest in the will; and Andrew M'Clelland, as one of the next-of-kin, claimed a distributive share. The petition prayed a declaration as to the person or persons entitled to the shares.

*Argument.*

Mr. Law, for the petitioner.

Mr. Serjeant *Christian* and Mr. *Joy*, for the three children of the second marriage, contended that the testator's intention was, as it was his duty, to provide for all his children of the second marriage. There were two difficulties in the way of the Court putting that construction of the will. The first arose from the words "after my death." That difficulty was met by the cases of *Jaggard v. Jaggard* (a), and *White v. Barber* (b); for, according to those cases, if a child had been born after the date of the will, though before the testator's death, he would take under the bequest. The second difficulty arose from the word "child." Three constructions might be put on the will—first, it might be held that the bequest was void for uncertainty; but that would altogether disappoint the testator's intention, and leave the children of the second marriage unprovided for. Secondly, that the eldest child alone should take; that would be either to defeat the intention, or to attribute a very capricious intention to the testator. The third construction was manifestly

(a) Pr. Ch. 175.

(b) Amb. 700; S. C., 5 Bur. 2713.

that intended, and the reasonable construction, viz., that the three children of the second marriage should take equally. That was supported by the authorities which held that the word "child" would be expounded so as to meet the intention of the testator: *Tompkins v. Tompkins* (a); 2 *Jar. on Wills*, pp. 108, 318; *Harrison v. Harrison* (b); *Spalding v. Spalding* (c); *Evans v. Astley* (d).

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Chancery.  
In re  
LINDSAY.  
Argument.

Mr. *Hutton* and Mr. *W. Crozier*, for William M'Murray, the residuary legatee, contended that the gift had lapsed and must fall into the residue. If there had been a posthumous child, those born after the will, and before the testator's death, must have been excluded. *White v. Barber* was overruled by the Court of Common Pleas in England, in *Doe d. Blakiston v. Hazlewood* (e). 1 *Jarm. on Wills*, p. 592; *Doe v. Fawcett* (f). As to the bequest falling into the residue, they cited *Cambridge v. Rous* (g); *Easum v. Appleford* (h); *Shanly v. Baker* (i); *Jackson v. Kelly* (k); *Jones v. Mitchell* (l); *In re O'Beirne* (m); *Leighton v. Bailie* (n).

Mr. *Robert Andrews*, for Andrew M'Murray, one of the next-of-kin of Anne M'Murray, argued that the bequest had failed, and did not pass under the residuary bequest, which was of all the testator's "other property."

THE LORD CHANCELLOR.\*

The question for the Court to decide on this special case is, to whom certain Bank shares mentioned in the will of Thomas M'Murray, in the events that have happened, now belong? This will was

Dec. 15.  
Judgment.

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|-----------------------|-----------------------|
| (a) Pr. Ch. 397.      | (b) 1 Russ. & M. 72.  |
| (c) Cro. Car. 185.    | (d) 1 Bur. 1507.      |
| (e) 10 C. B. 544.     | (f) 1 B. & Ad. 186.   |
| (g) 8 Ves. 12.        | (h) 5 M. & Cr. 56.    |
| (i) 4 Ves. 752.       | (k) 2 Ves. 285.       |
| (l) 1 Sim. & St. 290. | (m) 1 Jo. & Lat. 522. |
| (n) 3 M. & K. 267.    |                       |

\* Right Hon. FRANCIS BLACKBURNE.

1852.  
*Chancery.*  
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*Judgment.*

made in 1840, at which time he was married for a second time, but had not then had any children of that marriage. After bequests to his wife Margaret, is the bequest of the Bank shares, in these words:—"And in case of her having a child after my death, I leave to that child eight shares I have in the Northern Bank, and ten shares in the Belfast Bank." After his will he had three children—Thomas, George and Edmond, but he had not a posthumous child. These children contend that they are entitled to the Bank shares, and if they are, no other questions can arise. The Counsel for the children contend that, on the authority of *Jaggard v. Jaggard* (a), decided by Lord Somers, and of *White v. Barber* (b), which was a case from the Court of Chancery, and on the certificate in which Lord Apsley acted, all are entitled, though none of them was a posthumous child. It is on the other hand contended that the Court of Common Pleas in England, in the case of *Doe v. Hazlewood* (c), have entirely overruled and invalidated the authority of that case. If the case of *White v. Barber* be law, it plainly rules the present case in favour of the children; for it most unequivocally decides that several children, not posthumous, should all take, though the devise was plainly and unequivocally to a posthumous child, or posthumous children. In a conflict of such high authorities, I should be disposed to think my safe course would be to abide by the earlier decision, long recognised, and I have no doubt acted on as law. A decision of the Court of King's Bench in the time of Lord Mansfield, and by such distinguished Judges as those named in the certificate, followed by a decree of Lord Apsley in conformity with it, can hardly be said to be satisfactorily impugned by an order of a Court of Common Law on a motion.

But I think the claim of the children may be rested on another ground, which makes it not necessary to decide it on the authority of *White v. Barber*. In that case the words of the will were so unequivocally descriptive of a posthumous child or children, that no children born in the testator's lifetime could have been brought within the description, except by a construction which the Court

(a) Pr. Ch. 175.

(b) 5 Burr. 2703.

(c) 10 C. B. Rep. 544.

of Common Pleas thinks it was not in the power of any Court to adopt. But I have here to deal with an instrument most inartificially drawn, and with a bequest which, by punctuation and altering a word, may be made descriptive of children born before the death of the testator. If I read the sentence, "in case she has a child," interposing a comma, then I escape the absurdity, and the injustice of excluding the children born in his lifetime from any provision, and of making a provision for a child that never might come *in esse*, and whom the testator could never by possibility see. It has been, I think, most justly argued in support of this mode of reading and construing this short bequest, that we do not find the word "born," or any similar expression, pointing necessarily to the occurrence of the birth of the child after the death of the testator. His wife having a child, no matter when, may therefore reasonably be argued to be in his contemplation.

If I am right, that a child born at any time, and not a posthumous child alone, was within the meaning of this bequest—the question remains whether more than one child can take? It is manifest, that if all cannot take, the bequest must fail; for the testator has not said which shall take: each is the child of the wife, and there is no difference between the first and the last born, as objects described. Now, to avoid such a consequence, which is no less than the total disappointment of the testator's intention, and a breach of a natural obligation, I am quite justified by authority to hold that the particle 'a' is used to denote *any* child; and that each coming successively into existence becomes 'a' child within the meaning of the testator. *White v. Barber* is an authority for this, which is a point on which I do not think the Court of Common Pleas impugned its authority.

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—  
*Judgment.*

Declare that the three infant children of the testator, viz.—Thomas M'Murray, George M'Murray and Edmond M'Murray, are absolutely entitled to the eighteen Bank shares in the will and petition respectively mentioned; and let all parties be paid their costs of this matter out of the residuary personal estate of the testator; and accordingly,

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*Chancery.*  
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*Judgment.*

refer it to the Master to tax and ascertain the same respectively. And it appearing to the Court that the petitioners, as executors of the said testator, have paid over and transferred to the respondent William M'Murray, as residuary legatee, all of the said residuary personal estate, let the petitioner pay to the several respondents, save the respondent William M'Murray, their respective costs, when so taxed and ascertained as aforesaid; and let the petitioners add the same to their own costs, when so taxed and ascertained as aforesaid; and let the said respondent William M'Murray pay to the petitioner the amount of their own costs, and of the costs so directed to be paid by them to the other respondents as aforesaid.

*Reg. Lib. Gen. 7, f. 873.*

1851.

*Rolls.*

BAXTER v. COMBE.

(*In the Rolls.*)

July 24.

THE facts of this case, as stated in the bill and the several defences set up by the defendant's answer, appear in the report of the former motion for the injunction (1 *Ir. Chan. Rep.* 284). Under the order made on that motion, an action was brought in the Court of Queen's Bench.

The specification of the plaintiff's invention was given in evidence at the trial. After describing Robinson's machine, and describing accurately and by reference to drawings the improvements made therein by the plaintiff's invention, the specification proceeded thus:—"Having thus described the nature of my invention, and the means by which I carry the same into effect, I wish it to be understood that I do not confine myself to the precise details given, provided the peculiar character of my invention is retained: and what I claim as my invention is the application of mechanical means for turning or reversing the holders, as described, and dressing both sides of the flax at one end as it passes over the same line of hackles, whether of the same or different gradations, or finenesses of pins; and I claim this application, not only to the particular combinations of hackles as described, but to any other combination moved simultaneously in the same direction by the same common shaft or shafts, and to which it can be beneficially applied."

The following disclaimer, bearing date the 9th of September 1849, by the plaintiff, was also in evidence:—"Since the enrolment of the said specification, I have been advised that it might possibly be held in a Court of Law, that I claim the application of mechanical means generally to turn holders of hackling machines, whether such holders be caused to approach to and to recede from

On a motion for an injunction to restrain the infringement of a patent, an order was made that the motion should stand until the plaintiff brought an action at law. There was a verdict for the plaintiff, and the defendant tendered a bill of exceptions, pending which the motion was renewed; the Court granted an injunction, the plaintiff undertaking to abide any order which the Court might make, by directing an issue, or otherwise, to ascertain the damage, if any, which the defendants should sustain by obeying the order, in case the defendant should obtain judgment in the action at law.

Principles which guide the Court in granting or withholding

an injunction after verdict, but before the legal right is finally determined.

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*Rolls.*  
 BAXTER  
*v.*  
 COMBE.  
*Statement.*

the hackles or not; but such was not my intention, as my invention was directed only to improve machines where the holders approach to and recede from the hackles; for which reason I wish to disclaim, and I do hereby disclaim, the turning of holders used in machines by mechanical means, where the same are conducted continuously through the machines without the holders being caused to approach to and recede from the hackles."

The defendant, at the trial, contended that the patent was void, as against the defendant's patent, by reason of the specification being too general, and claiming to patent a principle, viz., the application of mechanical principles generally to turning and reversing the holders, and that the objection to it was not removed, but strengthened, by the disclaimer by which the plaintiff put that construction on the specification. But the Lord Chief Justice was of opinion that the patent and specification were valid, and that the disclaimer was unnecessary, and put the case to the jury on the patent and specification alone. The question put to the jury was, whether the defendant's alleged invention corresponded with the terms of the plaintiff's specification? The jury found a verdict for the plaintiff.

The defendant thereupon put in the following exception:—  
 "His Lordship having told the jury that the specification is valid, we call upon his Lordship to state to the jury that the specification, independent of the disclaimer, by reason of the plaintiff's claiming the application of mechanical means to machinery generally, would avoid the patent, and that the disclaimer cannot have the effect of making good the patent, as against the defendant's intervening patent."

The leading Counsel for the defendant certified that the bill of exceptions was not taken for delay, and raised a substantial question material to the decision of the case; and that besides the question raised by it, there were several other grounds on which the verdict should be set aside, and a new trial granted.

*Argument.*

Mr. *Brewster*, with whom was Mr. *Fitzgibbon* and Mr. *Maley*, moved for an injunction. They contended that the plaintiff's legal

right had been established by the opinion of the learned Judge and the verdict of the jury, and that the question on the construction of the specification was not properly raised by the exception, which was so informal that it could not be acted on; and at all events that construction was so clearly in favour of the plaintiff, that the Court would not withhold the injunction merely because a question had been raised by the defendant. They cited *Bouton v. Ball* (a); *Universities of Oxford and Cambridge v. Richardson* (b); *Bridson v. Benecke* (c); *Bowman v. Taylor* (d); *Baird v. Neilson* (e); *Muntz v. Grenfel* (f); *Sellers v. Dickenson* (g); *Newton v. Grand Junction Railway Co.* (h); *Gamble v. Kurtz* (i).

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Rolls.  
BAXTER  
v.  
COMBE.  
Argument.

Mr. Francis A. Fitzgerald and Mr. Pilkington, for the defendant, argued that there had not been what the Court had wished to procure, by making the order in November 1850, viz.,—a legal ascertainment of the plaintiff's right. He had no right to enter judgment at law until the exception was disposed of by the Court. Until that legal right was determined, the plaintiff had no right to an injunction: *Bacon v. Jones* (k). There had been no long and uninterrupted possession, to bring the case within the exception to the general rule stated in *Stevens v. Keating* (l), and *Electric Telegraph v. Nott* (m). The case stood, in all respects material to the application, in the same position as on the former motion, except that there had been a verdict and the opinion of a single Judge. There could be no determination on the legal right until the judgment is entered up at law. In England the case would be different, for there judgment could be entered notwithstanding the exception; and yet in *Hill v. Thompson* (n), Lord Eldon, under similar circumstances, refused an injunction. *Heath v. Unwin* (o) was also in point. *Bridson v. M'Alpine* (p) was

(a) 3 Ves. 140.

(c) 12 Beav. 1.

(e) 8 Cl. & Fin. 726.

(g) 5 Exch. Rep. 362.

(i) 3 C. B. Rep. 425.

(l) 2 Phil. 333.

(n) 3 Mer. 622.

(b) 6 Ves. 689.

(d) 2 Ad. & Ell. 278.

(f) 7 Jur. 121.

(h) 5 Exch. Rep. 331.

(k) 4 M. & Cr. 433.

(m) 2 P. Coop. 41.

(o) 15 Sim. 552.

(p) 8 Beav. 229.

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a case in which the Court would have granted the injunction, independently of the trial at law. That there was a substantial question raised by the exception was plain, from the certificate of the defendant's leading Counsel at law, and there was a *bona fide* intention to proceed with it. There were several questions to be determined—the construction of the specification and of the disclaimer, and the effect of the latter on the defendant's patent, which intervened: *Stocker v. Warner (a)*. The expense which the defendant had incurred in consequence of the plaintiff's delay: *Birmingham Canal Co. v. Lloyd (b)*; and the irremediable mischief which would be done him by the injunction, were sufficient grounds for refusing it.

#### THE MASTER OF THE ROLLS.

Judgment.

A motion was made in this case in last Michaelmas Term for an injunction to restrain the defendant from infringing the patent obtained by one of the plaintiffs, Peter Carmichael. When the case was before me, as it did not fall within the principle laid down by Lord Cottenham in *Stevens v. Keating*, applicable to cases where there has been a long and uninterrupted possession under the patent, I made the usual order that the plaintiff should bring an action at law, and that the motion should stand over. An action has accordingly been brought, and was tried before the Lord Chief Justice, and there has been a verdict for the plaintiff, who has now renewed his motion of last November, founding his claim to an injunction on the verdict, as establishing his right, as stated in the bill. A bill of exceptions, it appears, has been tendered, and the only ground which has been suggested, or which can be suggested, in opposition to this application, is the pendency of the bill of exceptions; for with regard to the new trial motion, I have not heard a word which would induce me to refuse this application. Judging from my own experience of the practice of the Common Law Courts, I think there is no ground, at least I have heard none, for moving to set aside the verdict as against the weight of evidence. There is no point of law raised in the case, except that which is the subject of

(a) 1 Man. Gr. &amp; Sc. 148.

(b) 18 Ves. 515.

the exception. I admit that if there be any informality in the exception, and the Chief Justice would not allow any alteration to be made, the point might be raised on a new trial motion, but no question of law arose except that which was intended to be raised by the exception.

With regard to the effect of the exception to the charge of the Lord Chief Justice, I may observe that there is no doubt about the law. It is only the application of the legal principle that can be doubted. There is no conflict of authority. In the case of *Hill v. Thompson* (a), Lord Eldon certainly did refuse to act on the verdict at law by granting an injunction, but he expressly stated the great doubt which he entertained as to the law of the case.

The case of *Bridson v. M'Alpine* (b) is most unsatisfactory, as reports always are when the judgment of the Court is given without a full statement of the facts of the case. The Judge is represented as laying down principles which in the abstract may be incorrect, and yet may be quite correct as applied to the particular case before him.

In the case of *Bridson v. Benecke* (c), a verdict had been obtained by the plaintiff, and a bill of exceptions had been tendered, which had not been disposed of. Lord Langdale, the same Judge who decided *Bridson v. M'Alpine*, said, "No argument was necessary to establish that a verdict is not a judgment, and that a bill of exceptions may possibly prevent the verdict from ever becoming a judgment. That, I think, would be admitted. Thinking, as I do, on the one hand, that this Court is not absolutely bound by the verdict, and thinking on the other hand that this Court ought not to disregard altogether a verdict which has been given after a careful trial, the result is, that this Court must act according to the circumstances appearing in each particular case." Then, in another part of his judgment he says, "The question remains, whether I can, on the mere ground that a bill of exceptions has been tendered to the Judge, refuse to the plaintiffs the benefit of all these circumstances? I am perfectly aware that the jurisdiction of this Court does

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Judgment.

(a) 3 Mer. 622.

(b) 8 Beav. 229.

(c) 12 Beav. 1.

1851.  
*Rolls.*  
 BAXTER  
 v.  
 COMBE.  
 Judgment.

necessarily appear to be somewhat anomalous. The Court acts in aid of a legal right, and yet, as I have already observed, there are many cases in which the Court is to such an extent satisfied that the legal right exists, that it will often give the plaintiff the benefit of the jurisdiction at the very same time that it thinks, for greater satisfaction, that there ought to be a subsequent trial. Cases of that kind have frequently occurred, where the Court is not quite satisfied; though the usual course is, to let there be a trial, and after that trial has taken place, and the verdict has been obtained, the Court will then determine, with reference to the circumstances, whether an injunction ought or not, at that time, to be granted."

Lord Langdale in that case fell into a mistake natural for an Equity Judge, that "a bill of exceptions may possibly prevent a verdict from ever becoming a judgment." In this country, judgment is not entered until the exceptions are disposed of; but in England judgment is entered up, and the exceptions are taken at once to the Court of Error. That circumstance, however, does not appear to me to make any very material difference.

If that case be law (and there is no reason to suppose that it is not), it is plain that the Court has a right to consider all the circumstances; and although it is not bound to grant an injunction after a verdict, in a case such as *Hill v. Thompson*, or *Bridson v. M'Alpine*, still, on the other hand, the Court may, in the exercise of its authority, and of a well regulated discretion, consider the circumstances of the case, and grant the injunction, if it be proper to do so, though the legal right has not been finally determined.

It is necessary that I should advert to the various defences which have been set up by the answer. One of these defences was, that the invention was not an original one. That is a question of fact; and there has been a finding of the jury upon it, which I am quite prepared to act on, in the absence of any argument to satisfy me that there is the slightest ground for impugning it.

The second ground of defence was, that the specification was imperfect. I can very well understand that a specification may be void. A monopoly may, for just reasons, be granted to a person who makes a useful invention; but it is his duty, in order

to entitle him to it, to act with perfect candour. His specification should be precise and accurate, so that the public may have the full benefit of the invention, at the determination of the patent.

It is therefore considered a sort of fraud to conceal the mode by which the invention is to be carried out. The specification ought to be perfect and precise. In my opinion there is no pretence for saying that the specification in this case was not accurate.

The third defence is, that this was an attempt to patent a principle; and the last defence is, that there had not been an infringement of the patent—that the machine alleged to have been invented by the defendant was an entirely different machine, and that although, in both inventions, the reversing the holder, which had previously been done by manual labour, in Robinson's flat machine, was done by machinery, yet the defendant's invention was not a colourable imitation, but a different mode of carrying out what was alleged to be a principle. These several matters required to be investigated in a Court of Law.

As I have already said, there is no ground for holding, and it has not been argued, that the specification does not correctly describe the invention. The finding of the jury establishes that the defendant has made use of the plaintiff's invention; that he has been making these machines, selling them and appropriating to himself the benefit and advantage of the invention, by means of a colourable imitation. Of course, in all cases of this kind, where a patent is infringed, there will be an attempt to make the imitation somewhat different from the original; but the verdict establishes that this was a colourable imitation.

With regard to the exception to the charge of the learned Judge, it is quite beside the merits of the case. It is in substance this—that although there was no intention to patent a principle, and although the specification could be justified by a mere inspection of the plaintiff's machine, yet the patent is so worded that it may be considered as involving a principle; that although the plaintiff does not seek or claim to monopolise a principle, yet, having unfortunately framed his patent in a peculiar way, he is thereby to

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*Rolls.*  
BAXTER  
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COMBE.  
*Judgment.*

1851.  
*Rolls.*  
 BAXTER  
*v.*  
 COMBE.  
*Judgment.*

be deprived of the advantage flowing from this important invention. It is in fact a sort of special demurrer to the patent, the defendant contending that he can show that it patented a principle, although it was never intended that it should; on that ground it is contended that the defendant is entitled to appropriate the advantage to be derived from this important invention. That is, as I have already said, a defence totally beside the merits, a mere legal crotchet, by means of which the defendant seeks to appropriate the advantage of the plaintiff's labour. I think it is the duty of a Judge, in considering a case of this kind, to see whether the defence set up is a mere legal one, beside the merits of the case; and although he must be cautious, and take care that no injustice is ultimately done to the defendant by granting the injunction, yet he is bound, when he has, as in this case, legal authority as high as that of any Judge in either country on the only question in the case—that question being merely a legal one, and altogether beside the merits—not to allow the defendant, during the next four months, to go on making and selling these machines, and to appropriate still further to his own use the benefit and advantage of the plaintiff's invention, on the ground that the wording of the patent goes too far, and patents a principle, and is not confined to what was, undoubtedly the invention of the plaintiff. Under these circumstances, the justice of the case, so far as I see at present, requires that I should grant the injunction. I do not say that the case on the bill of exceptions does not admit of argument; but my present impression is strongly in support of the view taken by the Lord Chief Justice.

In order to support the defendant's construction of the patent, it is necessary to strike out the words "as described" from the specification. I think it not at all an unreasonable construction to incorporate into the specification the previous description. Afterwards the disclaimer states, "I wish to disclaim, and I do hereby disclaim, the turning of holders, used in machines by mechanical means, where the same are conducted continuously through the machines, without the holders being caused to approach to and recede

from the hackles." The defendant seeks to strike out the words "as described," and make the patent one for turning and reversing the holders by mechanical means generally. The point is totally beside the merits, and if it should turn out to be unsustainable, I should be doing the greatest injustice to the plaintiff by refusing the injunction. On the other hand, I cannot think that I should do injustice to the defendant by depriving him of the opportunity of selling these machines, in the interval between this and next November, because there is a mode by which the possibility of injustice being done to him may be prevented. At present, I entertain a strong opinion that the plaintiff must ultimately succeed; but I shall put him under the terms of undertaking to abide such order as the Court may make, in directing an issue to ascertain the damage which the defendant may suffer, in consequence of the granting of the injunction.

The difficulty which Lord Cottenham felt in granting injunctions of this kind was, that by doing so, the Court might do the defendant irreparable damage, as it has no power to make the plaintiff responsible to the defendant for damage occasioned by granting the injunction, should the defendant ultimately succeed. That was the difficulty which always occurred to Lord Cottenham; but I think it may be obviated, by making it part of this order, that the plaintiff shall undertake to abide any order which the Court may make in favour of the defendant, if he should get judgment at law, whether by directing an issue to ascertain the amount of damages which shall have been sustained by granting the injunction, or otherwise. With that addition; I shall make the order in the form suggested by Mr. *Fitzgibbon*.

I think that order will do justice, in any event. Should the opinion of the Lord Chief Justice, on this purely technical point, be overruled by the full Court, the damage done to the defendant may be set right by an issue; because a jury would be able to judge, on production of the defendant's books, of the profit which he has made by the sale of these machines, and they would be justified in estimating the damages at the same amount as the profit derived from the

1851.  
Rolls.  
BAXTER  
v.  
COMBE.  
Judgment.

1851.  
*Rolls.*  
**BAXTER**  
*v.*  
**COMBE.**  
*Judgment.*

sale of the machines, for the same period as that during which the injunction was in force, and to add to that amount any amount which may be necessary to compensate the defendant for the loss and inconvenience of discharging his workmen and breaking up his establishment.

The order which I am about to make will also meet the justice of the case, should any other question arise as to the validity of the patent, in addition to the point of law raised by the exception, which I consider altogether beside the merits of the case.

I think the patent was a fair and *bona fide* one. It cannot be suggested that the plaintiff intended to act fraudulently, by endeavouring to conceal or not to explain the nature of his invention.

The whole point turns on the words "as described." I do not think those words can properly be struck out, having regard to the principles of construction which are applied to patents. I am quite sure that the order which I have stated, and which I am about to make, will meet the justice of the case. I therefore think that I am justified in acting on my present impression, agreeing as it does with the high authority of the Lord Chief Justice.

I may observe that if the plaintiff obtains judgment in the Court of Queen's Bench, this Court would be satisfied with it, as establishing the plaintiff's legal right, without regard to a writ of error being brought.

*Order.*

It is ordered by the Right Honourable the **MASTER OF THE ROLLS**, that an injunction do issue in this cause, to restrain the said defendants, James Combe and William Dunville, from constructing any machine or machines for hackling flax, in imitation or resemblance of the flax hackling machine described in the patent granted to the plaintiff, Peter Carmichael, bearing date the 14th day of May 1846, and enrolled on the 16th day of May 1846, and the specification to said patent annexed, as in the pleadings in this cause mentioned; and from manufacturing or constructing any machine or machines for hackling flax,

wherein shall be adopted, embodied, or used, the mechanical contrivance described in the said specification enrolled with the said patent, on the 13th day of November 1846, for turning the flax holders as described in the said specification, or which shall embody or contain an imitation thereof, with any colourable deviation, but embodying in substance the reversing principle so described in said plaintiff's patent and specification, without the consent of the plaintiff, until the hearing of this cause, or further order: the plaintiff undertaking to abide any order the Court may hereafter make, either by directing an issue or otherwise, to ascertain the amount of damage, if any, which the defendant shall sustain by reason of obeying this order, in case the defendant shall obtain judgment in the action at law.

1851.

*Rolls.*

BAXTER

v.

COMBE.

*Order.*

1851.  
*Chancery.*

## BAXTER v. COMBE.

(*Chancery*).

*Aug. 4.*

The order at the Rolls in this case, *ante*, p. 245, affirmed.

THE defendant appealed from the order of the Master of the Rolls.

The arguments were substantially the same as those urged at the Rolls, and the same authorities were cited.

The LORD CHANCELLOR.

*Judgment.*

I do not think I ought to disturb the order which the Master of the Rolls has made, under the particular circumstances of this case. The Court feels itself bound, *prima facie*, to make an order for the injunction on the verdict of a jury, although it is not of course to make it when the question is still open in a Court of Law. The authorities all state that the question is one to be determined by the circumstances of each particular case.

I have not in this case to deal with an order such as that pronounced in *Bridson v. Benecke*, granting an injunction absolutely; and yet when I look to that case, and see what was done in it, it is very difficult to perceive any sound distinction between that case and this, although there are some circumstances in it which do not apply to this, and some matters in this case which did not occur there. The bill has been filed to restrain the defendant from infringing a patent right which was claimed by the plaintiff. Undoubtedly there has been in this case considerable delay in filing this bill. Some delay occurred also in *Bridson v. Benecke*, but not to the same extent, and it was observed on by the Court. But it is not pretended that there is any delay in this case which could be made the basis of an argument against granting the injunction at the final hearing of the cause; nor was it contended that, taking the verdict *per se*, there could be any answer to the motion for the injunction. Therefore, I have only to deal with a question of discretion as to the

course which the Court ought to adopt in relation to the matters which have happened.

The state of the case, as it now stands, is that the verdict has established a great many matters in favour of the plaintiff, which it is of importance to look to on the present application. It has established the validity of the plaintiff's patent in every respect in which it can be considered as open to be disturbed, by reason of the particular objection taken at the trial, and intended to be made use of by way of exception. It has been stated by the defendant's Counsel that they are not in a position to contend, at least they have not contended before me, that the verdict is against the weight of evidence, or that any evidence was admitted which was objected to, or any evidence excluded which ought to have been admitted, or that any question of fact was withheld from the jury which they called on the Judge to leave to them, or any question of fact left to the jury which ought not to have been left to them, or, in short, that there is any thing to argue in the case except the question raised by the bill of exceptions; so that in every point of form and of substance, except that single one, the verdict is unexceptionable. It has established various matters, I may say the whole case of the plaintiff, save so far as it is open to question on the exception. It has established that the plaintiff's invention possesses the character of utility, novelty and practicability—in fact that it fulfils all the conditions requisite on the part of the inventors of any particular thing, which they seek to make the subject of a patent. It follows from that, that if the specification, which has been made part of the patent, had been as guardedly and cautiously worded as the plaintiff says it should have been, and as he intended, viz., confined in strict and literal terms to the matter described by the specification, there could be no imaginable objection to the patent. The verdict has further established that the defendant has infringed this invention—I will not say infringed the patent, but infringed the invention; that he has made a machine corresponding in substance with the plaintiff's machine, and, if differing from it at all, differing from it in matter of so little importance as to make a machine corresponding with the plaintiff's. That is established, for otherwise there would have been

1851.

*Chancery.*

**BAXTER**

**v.**

**COMBE.**

*Judgment.*

1851.  
*Chancery.*  
 BAXTER  
 v.  
 COMBE.  
 Judgment.

no verdict for the plaintiff. It is therefore established that the plaintiff invented a useful and novel machine, that he obtained a patent for it, and that the defendant, in violation of that patent, made a machine; and if the specification which was incorporated with the patent had been critically and literally correct—it not being pretended that the verdict was opposed to the direction of the Judge—in point of law, every thing has been accomplished which the plaintiff sought by the trial, as regards the novelty, value and utility of the invention, and as regards the conduct of the defendant in infringing it.

It would follow as a matter of course from that, that the Court should award an injunction in this case, even prior to the hearing of the cause. But it is said that an objection has been taken to the charge of the learned Judge, which may be made the subject of a motion for a new trial or of a bill of exceptions. I am not called on to make an order which would take from the defendant all protection or all redress, in the event of his being ultimately successful, nor am I to consider this as an order which the Court would make before a trial at law, nor whether I should give the protection which at that stage of the case the Court would think the defendant entitled to—but I am to consider what order I ought to make at this stage of the cause, which will give the defendant the quantum of protection which he ought to get; and the whole question is, whether the defendant has not, by the order appealed from, got as much protection as he ought to get, under the particular circumstances of this case?

I do not go critically into the legal question, or into the frame of the exception, but, if I remember right, it would be difficult to sustain this exception, in point of form. We all know how strictly parties are held to the exception on record. This exception, as it stands, seems to me really not capable of argument. I do not say that the Chief Justice might not permit the defendant to correct it, or that the Court might not hold it to be capable of explanation: but as it stands, it goes far beyond what was intended to have been the subject matter of it, and it is a question whether the Court would allow the parties to restrict it.

It states the specification to have done what it did not do. It charges the specification to amount to a claim the most wild and extravagant that ever was made—to claim “the application of mechanical means to machinery generally”—not the application of mechanical means generally to the purpose which is sought to be accomplished, as stated in the specification, but “to machinery generally.” If the question was to be raised on this exception as it stands, I cannot imagine that the Court would listen to an argument on it for a moment. The exception is this:—“His Lordship having told the jury that the specification is valid, we call on his Lordship to tell the jury that the specification, independent of the disclaimer, by reason of the plaintiff claiming the application of mechanical means to machinery generally, would avoid the patent.” The specification claims the application of the mechanical means described, or of mechanical means generally, to a particular purpose, which it claims to be new in invention, idea and practice; but it does not claim the application of mechanical means to machinery generally. It may be said that the exception goes further, “and that the disclaimer cannot have the effect of making good the patent as against the defendant’s intervening patent.” I could understand that the disclaimer would not give validity retrospectively as against a machine which it would have been in the power of the defendant to make if the patent was not correct. But what validity could be given to the defendant’s patent for a machine, which the verdict of the jury has found to be a copy of the plaintiff’s machine, which was then in use, whether the plaintiff’s patent be good or bad? It appears to me, therefore, that the intervening patent is altogether beside the question intended to be raised by the objection. I will not say that the Court of Law might not think the matter one to be argued. But when I am called upon to suspend the action of this Court, and to refuse what the Court would concede as a right, and what the Court has given as a right, even after a bill of exceptions has been tendered—when I am asked to do that, I am bound to look to the form of the exception, and to see, according to my own judgment, whether the Court would listen to it, or whether the

1851.  
*Chancery.*  
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Judgment.

1851.  
*Chancery.*  
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 COMBE.  
 Judgment.

party could found an argument upon it. I do not say that the Court of Law would not be authorised to adopt a different view of the exception; but all I say is, that it appears to me to the last degree improbable, and unless a proposition founded on a narrower ground be introduced into it, it would appear to me impossible to maintain the exception.

Under these circumstances, this being, after all, a question of the balance of inconvenience, I asked whether the defendant has any other business or occupation except that of making these machines, and I am informed that he is a general manufacturer of machines of other descriptions also. He swears, to be sure, that he has invested a large amount of capital in the manufacture of these machines—that is a very flexible phrase: it may have different meanings, according to the understanding of the party using it, and is too general to act on in a case like this. It further appears, that for a long time he agreed to pay £10 a-machine for a license from the plaintiff, and probably he may have gone on to some extent in this matter, relying on the delay of the plaintiff, whom he had set at defiance.

I do not think it necessary further to allude to these questions; but I cannot overlook the conduct of the defendant—the fact of his having obtained and acted on the license for a considerable time, and having thus obtained an insight into the minutiae of the invention, whereby he was able to accomplish the same thing by what he may have thought to be different means. Something of the same kind occurred in *Bridson v. M'Alpine*. If there be inconvenience in the matter, the defendant has brought it on himself: he has chosen to embark wilfully in the manufacture of these machines, having full notice of the plaintiff's invention and of his patent. The inconvenience, if there be any, has been the result of his own act.

It appears that the order which I have to deal with, though not a usual order, nor one which I should be disposed to make at an earlier stage of the cause, has been adopted from a precedent in England. Considering what has taken place in this case already, I do not think the defendant has any right to complain of this order.

It is open certainly to the objection that the plaintiff's undertaking may be rendered unavailable by an abatement of the suit. That is not very likely to happen, and the effect of it may to some extent be obviated by introducing the words "jointly and severally," which is the only alteration which I shall make in the order, which I think is right, and will meet in every respect the justice of the case.

The costs of this motion will be costs in the cause, as there is some novelty in the order. The defendant's deposit must be returned.

1851.  
*Chancery.*  
BAXTER  
v.  
COMBE.  
*Judgment.*

1853.

*Rolls.*

## SYNGE v. SYNGE.

*(In the Rolls.)**April 18.*

The dividends of a sum of Bank stock, and another sum in £3½ per cent. stock, were, by a deed made between E. S. and several of his creditors, assigned to a trustee, in trust to pay the dividends of the Bank stock to E. S., for his maintenance and support, until he should become a bankrupt or insolvent, or assign the same, or until any creditor of his should do any act or acts for the purpose of having same applied in or towards payment of his individual debt, and no longer; and as to the residue of the stock, and as to the said dividends, from and after the time when E. S. should become bankrupt or insolvent, or assign the same, or from and after the time when any creditor of his should proceed to attach the same for payment of his individual debt, upon certain trusts for the benefit of scheduled creditors. The deed contained a proviso, that the deed might be cancelled, on the application of the trust funds changed by the consent of the majority of the scheduled creditors and E. S. A creditor of E. S., who was not a party to the deed, and whose judgment was prior to it, obtained a conditional order to charge the two sums of stock. E. S. showed cause, relying on the deed.—*Held*, that the conditional order was not a proceeding to attach the dividends which gave effect to the limitations over.

ON the 21st of January 1853, a conditional order was made, charging the sum of £1846. 11s. 3d., portion of a sum of £2564. 11s. 5d., Bank of Ireland stock, and the sum of £5809. 16s. 4d., Government £3½ per cent. stock, standing in trust for the respondent Edward Synge, for life, with the amount due on foot of a judgment obtained by the petitioner in Easter Term 1850, against Edward Synge.

On the 21st of May 1852, Edward Synge had executed a deed, the provisions of which are fully stated in the judgment of the MASTER OF THE ROLLS. Edward Synge relied on the deed as cause against the conditional order.

Mr. Otway and Mr. Edmond D. Latouche, for Edward Synge, contended that the limitation over of the dividends, in favour of the scheduled creditors, had taken effect in consequence of the granting of the conditional order, or would take effect on the order making it absolute; and there would, therefore, be no fund on which the charging could operate. They cited *Wood v. Dixie* (a); *Estwick v. Caillaud* (b); *Harland v. Binks* (c).

to the residue of the stock, and as to the said dividends, from and after the time when E. S. should become bankrupt or insolvent, or assign the same, or from and after the time when any creditor of his should proceed to attach the same for payment of his individual debt, upon certain trusts for the benefit of scheduled creditors. The deed contained a proviso, that the deed might be cancelled, on the application of the trust funds changed by the consent of the majority of the scheduled creditors and E. S. A creditor of E. S., who was not a party to the deed, and whose judgment was prior to it, obtained a conditional order to charge the two sums of stock. E. S. showed cause, relying on the deed.—*Held*, that the conditional order was not a proceeding to attach the dividends which gave effect to the limitations over.

*Quære*—Whether the limitations over be not void?

No creditor claiming under the deed showing cause, the Court made the order absolute as to the dividends of the Bank stock, but allowed the cause as to the £3½ per cent. stock, the deed being for valuable consideration.

(a) 7 Q. B. R. 892.

(b) 5 T. Rep. 420.

(c) 20 Law Jour., Q. B., 126.

Mr. *Leslie*, in support of the conditional order, argued that the deed was fraudulent and void against the petitioner, not being a deed for the benefit of the general body of the creditors, to whom it was not communicated, and who did not appear to have assented to it, and excluding the petitioner from the benefit of it. But supposing the deed itself to be valid, the limitation over on the bankruptcy or insolvency of Edward Synge was void: *Lester v. Garland* (a); *Phibbs v. Lord Ennismore* (b); *Smith v. Keating* (c).

1853.  
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SYNGE  
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SYNGE.  
Argument.

THE MASTER OF THE ROLLS.

An order was made in this case on the 21st of January 1853, that the sum of £1846. 11s. 3d., being portion of the sum of £2564. 11s. 5d., Bank of Ireland stock, and the sum of £5809. 16s. 4d., Government £3½ per cent. stock (which sums are standing in the books of the Governor and Company of the Bank of Ireland, in the name of John David Latouche and the Rev. Robert Fetherston Jessop, in trust, as to the interest or annual dividends thereof, for the use of the respondent Edward Synge for life), should, pursuant to the provisions of the Act 3 & 4 Vic., c. 105, ss. 23 and 24, stand charged, as far as the same will extend, with the payment of the sum of £10,800, and the sum of £3027. 13s. 11d., making together the sum of £13,827. 13s. 11d., being the amount due for principal and interest up to the 11th day of January 1853, at foot of the judgment obtained in the Court of Queen's Bench in Ireland, in or as of Easter Term 1850, against the said Edward Synge, by the petitioner, unless, in ten days after the service of the order on the respondent, good cause should be shown to the contrary.

April 19.  
Judgment.

It is not disputed or questioned, that the trustees originally held the fund in trust for the respondent Edward Synge. Therefore, there is a *prima facie* case in favour of the petitioner. Edward Synge has served a notice to show cause against the conditional order, the cause being founded on a deed bearing date the 21st of May 1852, and the whole question turns on that deed.

The deed is made between the said Edward Synge, of the first part, William Digges Latouche, of the second part, and the several

(a) 5 Sim. 205.

(b) 4 Russ. 131.

(c) 6 C. B. Rep. 136.

1853.  
*Rolls.*  
 SYNGE  
 v.  
 SYNGE.  
*Judgment.*

creditors of the said Edward Synge, whose names and seals were affixed thereto, of the third part. It is not an ordinary creditor's deed, transferring the property for the benefit of all the creditors who should sign the deed, but is in favour of a particular class of creditors, seven in number, excluding from the benefit of the deed all other creditors, and excluding, in terms, the petitioner. The deed recites that Edward Synge was indebted to divers persons, having charges and securities, the nature of which, and the amount secured thereby, were set opposite their names in the schedule thereto annexed; and that the said creditors had demanded from the said Edward Synge payment of the several sums respectively due to them, which payments, or any of them, he was unable to make; and that some of said creditors had issued writs against the person of the said Edward Synge, but consented to withdraw the same, provided he would convey certain properties and funds of which he was seised or possessed, upon the trusts therein-after expressed, to which the said Edward Synge had agreed. The deed then recites the several properties and funds, and among other funds, the subject of the conveyance, were the dividends of the sum of £1846. 11s. 3d., Bank of Ireland stock, and also the sum of £5809. 16s. 4d., Government £3½ per cent. stock. These funds were conveyed to the trustees upon certain trusts, "as to the interest and dividends, or annual proceeds of the said sum of £1846. 11s. 3d., stock, &c., upon trust to pay the same *to the said Edward Synge, for his maintenance and support*, until he (the said Edward Synge) shall become a bankrupt or insolvent, or assign or transfer the same, or any part thereof, or until any creditor of said Edward Synge shall do any act or acts for the purpose of having such interest, dividends or annual proceeds applied in or towards payment of his or their own individual debt or debts, and not longer; and as to, for and concerning the residue of the rents, issues and profits of the said lands, hereditaments and premises hereby firstly conveyed, and the interest and dividends, and the annual proceeds of the residue of the several stocks, funds and securities, and long annuities, hereby secondly conveyed, and as to the interest or

dividends on said sum of £1846. 11s. 3d., stock, of the Governor and Company of the Bank of Ireland, from and after the time when the said Edward Synge shall become bankrupt or insolvent, or assign the same, or from and *after the time when any creditor of his shall proceed to attach the same, for the payment of his or her individual debt*, upon trust, that he the said William Digges Latouche, his executors, &c., do and shall stand possessed of, and apply the same, in the first place in payment and discharge of a sum of £60 sterling," to the solicitor of Edward Synge: in the second place, of a sum not exceeding £2. 10s. 0d., per cent. on the amount received by him, and also £5 per cent. receiver's fees on all rents received, and to reimburse himself all further costs and expenses; and in the third place, to pay the premiums on a certain policy of assurance for £1000; in the fourth place, to effect a policy or policies of insurance on the life of the said Edward Synge, with some established company or companies, for £4000, and to keep up the premiums on such policy or policies; and lastly, to invest the residue, if any, of the trust funds in the Government funds, so as to accumulate a fund upon compound interest during the life of the said Edward Synge, which, at his decease, was to be paid in certain rateable proportions to the creditors (seven in number) named in the schedule to the deed, excluding from the benefit of the deed the petitioner and the other creditors. There is also a clause at the end of the deed, that, "upon the majority in value of the creditors named in said schedule hereunto annexed, consenting, these presents may be cancelled with the assent of the said Edward Synge, and another deed, which may be agreed upon by said majority of creditors and said Edward Synge, executed for the purpose of applying the funds and properties hereby assigned and conveyed, in any other manner for the benefit of said creditors as they may agree upon, or to charge the application of the properties so assigned by these presents, in creating a fund for the payment of the creditors of the said Edward Synge, or otherwise, as the majority in value of said creditors may agree upon."

1853.  
Rolls.  
SYNGE  
v.  
SYNGE.  
Judgment.

The first question which arises is, whether or not I ought to make the conditional order absolute as to the dividends of the

1853.

*Rolls.*

SYNGE

v.

SYNGE.

*Judgment.*

£1846. 11s. 3d. No creditor in the deed has shown cause against the conditional order. It is Edward Synge himself who has shown cause, and it has been contended by his Counsel, that the effect of the conditional order to charge the funds, under the 3 & 4 Vic., c. 105, has been to give operation to the limitation over, so that the property is now vested in the trustee for the benefit of the scheduled creditors. I think it would be difficult to sustain that argument; for if it is valid, a mere proceeding, whether well or ill founded, by a person claiming to be a creditor, would be sufficient to deprive Edward Synge of the interest which he takes under the deed. If I were to allow the cause shown against the conditional order, the limitation over would not take effect; and I apprehend that the conditional order cannot properly be considered as a proceeding to attach the dividends of the £1846. 11s. 3d., within the meaning of the deed, before it is made absolute. I am of opinion, therefore, that the conditional order had not the effect of bringing the limitation over into operation, and that it could only be brought into operation by making the order absolute.

Then, it is contended, that if I make the order absolute, the consequence will be to deprive Edward Synge of the benefit of the provision and allowance for his maintenance, and that no benefit will be conferred on the petitioner; because the moment the order is made absolute, the provision for the maintenance and support of Edward Synge ceases, and the amount of it becomes applicable, with the rest of the property, under the trusts of the deed, for the benefit of the seven scheduled creditors. That argument assumes the whole question. I entertain some doubt whether that would be the effect of making the order absolute. It is perfectly well settled in bankruptcy that a limitation in this form, by a party seeking to make his property go over in the event of his bankruptcy, is null and void, as in fraud of creditors. It is said that the same principle does not apply to a limitation in the event of the party becoming insolvent, or in the event of his creditors proceeding to attach his property. I apprehend, however, that a serious question arises, whether the provisions in

the deed which gave the interest and dividends of the £1846. 11s. 3d. Bank stock, to Edward Synge, for his maintenance and support, until he should become bankrupt or insolvent, or should assign same, or until any creditor of his should proceed to attach said dividends for the payment of his individual debt, and the limitation over in any of these events, are not contrary to the policy of the law.

1853.  
*Rolls.*  
SYNGE  
v.  
SYNGE.  
*Judgment.*

The case of *Phibbs v. Lord Ennismore* is very much calculated to show that the principle which I have stated is not confined to the case of bankruptcy. In that case an instrument was executed, by which C. M. Balders covenanted not to sell or incumber the lands comprised in the term; and it was declared that if he should at any time sell or incumber them, or attempt so to do, the trustees of the term should receive the rents and profits, and apply them as they might think fit for the maintenance and support of the said C. M. Balders, or his wife, or children or issue. It was held that the covenant and this proviso were fraudulent and void as against a subsequent incumbrancer of C. M. Balders' life estate. Lord Lyndhurst, in delivering judgment, said:—"The transaction in that respect—(i. e., enabling the trustees to apply the rents and profits for the maintenance of Balders himself)—cannot be sustained. Balders has a life interest in certain property; having that life interest, can it be contended that he can enter into a covenant—a private deed—with his own trustees, that he shall not incumber his interest in the property; and that, if he does incumber it—if, for instance, he sells it for valuable consideration—the effect is to be that the purchaser shall not be entitled to possess what he has bought, but that Balders himself, subject to the discretion of his trustees and under their direction, shall continue to enjoy the rents and profits, as if the alienation had not taken place? In point of law such a transaction cannot be sustained. The only question which admits of doubt is—whether the provision can be sustained against the incumbrancer, so far as regards the application of the rents and profits to the maintenance of the wife and children? It was admitted on all hands that the parties to the deed did not contemplate a fraud; but the transaction is in its

1853.

*Rolls.*

SYNGE

v.

SYNGE.

*Judgment.*

very nature fraudulent. Though the parties had no fraud in view, the deeds themselves are fraudulent. If the tenant for life procured any person to advance money to him on the security of the property—in that event, and in that event only—was the instrument in question to have operation. In point of law the deed cannot be sustained.”

It is not necessary, however, that I should decide the question on this motion. I have not the proper parties before me. The persons interested in arguing the question are the scheduled creditors; they do not appear on this motion. The party who appears is Edward Synge, who, if the argument on his behalf be well founded, has not the slightest interest the moment the order is made. I do not think, therefore, it would be proper to decide the question as to the validity or effect of the provision in the deed as to the dividends of the £1846. 11s. 3d. Bank stock, on this motion, in the absence of the scheduled creditors. At present the dividends on the said sum of £1846. 11s. 3d. Bank stock, due or to accrue due, are vested in the trustees in trust for Edward Synge, and I am not to speculate on a matter, which is one of considerable doubt, whether the effect of my order will be to give no advantage to the petitioner. There is some ground at all events for saying that this deed may not be considered binding on the petitioner, so far as it relates to the dividends on the said Bank stock, if a cause petition shall be filed by him. I shall, therefore, make the order absolute as to the dividends of the £1846. 11s. 3d. Bank stock, although I do not decide the question which arises on the deed, in the absence of the scheduled creditors. I shall thus enable the petitioner to proceed by cause petition, at the expiration of the period mentioned in the statute, in order to have the dividends of the Bank stock paid to him. To that cause petition the scheduled creditors should, I apprehend, be parties, and the question as to the effect of the clause in the deed will properly arise in such suit.

With regard to the other sum of £5809. 16s. 4d. Government £3½ per cent. stock, mentioned in the conditional order, it is by the deed transferred to the trustees for the benefit of the scheduled creditors, without any limitation, for the benefit of Edward Synge,

similar to that contained in the deed as to the £1846. 11s. 3d. There appears to have been consideration for the deed, and there is no reason to treat it as a voluntary instrument; at all events it cannot be set aside on this motion. The deed is for valuable consideration, and, as such, an answer to the application for a charging order, so far as the £5809. 16s. 4d. is concerned, unless it could be contended that there will be a surplus after payment of the scheduled creditors. There is no affidavit which would lead me to suppose that there will be such a surplus. I shall, therefore, allow the cause shown, except as to the dividends on the sum of £1846. 11s. 3d.

1853.  
*Rolls.*  
SYNGE  
v.  
SYNGE.  
*Judgment.*

Let the cause shown by the respondent, Edward Synge, against the conditional order of the 21st of January 1853, be allowed, without costs, save as to the sum of £1846. 11s. 3d., Bank of Ireland stock, in said conditional order mentioned; and accordingly let the dividends and interest on the said sum of £1846. 11s. 3d.—(being portion of a sum of £2564. 11s. 5d., Bank of Ireland stock, now standing in the books of the Governor and Company of the Bank of Ireland, in the names of John David Latouche and the Rev. Robert Fetherston Jessop, in trust as to the said interest or annual dividends thereof for the use of the said Edward Synge for life)—pursuant to the provisions of the Act 3 & 4 Vic., c. 105, ss. 23 and 24, stand charged, as far as the same will extend, with the payment of the sum of £10,800, and the sum of £3827. 13s. 11d., making together the sum of £13,827. 13s. 11d., being the amount due for principal and interest, up to the 11th day of January 1853, at foot of the judgment obtained in the Court of Queen's Bench, in Ireland, in or as of Easter Term 1850, against the said Edward Synge, Esq., by the petitioner: and let so much of said conditional order, bearing date the 21st of January 1853, as restrains the transfer of the sum of £5809. 16s. 4d., Government £3½ per cent. stock, in said order mentioned,

*Order.*

1853.  
*Rolls.*  
 ———  
 SYNGE  
 v.  
 SYNGE.  
 ———  
*Order.*

and the payment of the dividends due, or to accrue due on said Government £3½ per cent. stock, be discharged: and let the petitioner and respondent respectively abide their own costs of this motion.

*Rolls Motion Book, 337, f. 283.*

1853.  
 Nov. 4.  
 1854.  
 Jan. 13.

### HERBERT v. GREENE.

This Court will not appoint a receiver in a foreclosure suit, or a suit to raise a charge affecting lands, unless a year's interest is due, or the property is in danger of being evicted (*e. g.*, for non-payment of head-rent), or there is reason to apprehend that it will be insufficient to pay the charges on it. An absolute order for a sale in the Incumbered

THIS was an appeal from a decretal order of Master Brooke, to whom the cause had been referred by the Lord Chancellor, under the 15th section of the Court of Chancery (Ireland) Regulation Act, 1850. The statements in the petition and the decretal order are fully stated in the judgment of the MASTER OF THE ROLLS.

Mr. *Harris*, in support of the appeal, argued that the statute 13 & 14 *Vic.*, c. 429, gave the judgment creditor the same security as, but no greater than, a mortgagee; and a mortgagee could not obtain a receiver unless an arrear of interest was due. The interest given by the statute was analogous to that of an ordinary mortgage.

It did not resemble a Welch mortgage, which could not be foreclosed, nor a tenancy by elegit, which was abolished by the Act:

*Coote on Mortgages*, p. 75. The Incumbered Estates Act contained

Incumbered Estates Court will not of itself induce the Court to vary the rule.

But where a judgment creditor, who had registered an affidavit of ownership, under the 13 & 14 *Vic.*, c. 29, on the same day filed a cause petition, which was referred to the Master, under the 15th section of the Court of Chancery (Ireland) Regulation Act, 1850; and the Master made a decretal order, appointing a receiver for the payment of the sum due on foot of the judgment: the Court, on appeal, it appearing by affidavit that the lands would be insufficient to pay the judgment, extended the receiver, who had been appointed in another matter, but reserved the question of costs, until the produce of a sale which was pending in the Incumbered Estates Court should be ascertained.

nothing to give the creditor a right to a receiver, in a case where he had it not before.

Mr. *F. Fitzgerald* and Mr. *Exham*, in support of the decretal order, argued that, from the schedule of incumbrances in the Incumbered Estates Court, it appeared that the fund was a deficient one, which was sufficient ground for the appointment of a receiver. The Act intended to give the judgment creditor an immediate remedy, in substitution of the remedy by elegit, which he could have resorted to before. This was in fact the only remedy which the creditor had, for he was precluded by the 42nd section of the Incumbered Estates Act from seeking a foreclosure and sale: *Bennett v. Briscoe* (a); *Corban v. Mountcashell* (b); *Coots on Mortgages*, p. 553.

THE MASTER OF THE ROLLS.

In this case a motion has been made on the part of the respondent, by way of appeal from the decretal order of William Brooke, Esq., the Master in this matter (which order bears date the 8th of August 1853), that the said decretal order might be varied and set aside, so far as the same has decreed and ordered the appointment of a receiver in this matter, and so far as the Master has referred it to the Receiver-master of the Court to appoint a receiver over the estates of the respondent in this matter, and so far as the said Master has ordered that the receiver so appointed may, upon his entering into security by recognizance, and upon certificate of the due enrolment and registration of said recognizance, be at liberty to act, without any further order; and so far as it ordered that upon the service of the said decretal order, the said several tenants of the estates of the said respondent should pay their rents to the receiver; and so far as it is ordered that the said receiver shall from time to time, as he shall find funds applicable thereto, apply the same in payment of the said petitioner's demand, inasmuch as the said Master ought not to have made any order for the appointment of a receiver in this matter, no interest having been due on

(a) 1 Ir. Chan. Rep. 594.

(b) 1 Ir. Chan. Rep. 234.

1853.  
*Rolls.*  
HERBERT  
v.  
GREENE.  
Argument.

1854.  
Jan. 13.  
Judgment.

1854.  
*Rolls.*  
 HERBERT  
 v.  
 GREENE.  
*Judgment.*

foot of the judgment debt in the cause petition mentioned, at the time of filing such petition, and there being now no jurisdiction in the Court to order the payment of the principal of the said judgment out of the rents and profits of the said estates of the respondent; and inasmuch as the Master ought to have refused to make any order appointing a receiver in this matter.

An order was made in this case by the Lord Chancellor, under the 15th section of the Court of Chancery (Ireland) Regulation Act, 1850, which order bears date the 16th of May 1853, whereby it was referred to the Master to consider the matter of the petition, and proceed thereunder, pursuant to the statute.

The petition, which was filed on the 10th of May 1853, stated that the petitioner, in or as of Easter Term 1853, obtained a judgment in the Court of Queen's Bench in Ireland, against John Greene, the respondent, for the sum of £137. 5s. 11½d.. That at the time of obtaining the said judgment, the respondent, John Greene, was and still is seised of an estate of inheritance or possessed of, or otherwise well and sufficiently entitled to, certain lands and hereditaments particularly described in the petition. That in pursuance of the provisions of the 13 & 14 of *The Queen*, c. 29, the petitioner duly made, and caused to be filed in said Court of Queen's Bench, an affidavit stating the particulars of said judgment, and that the respondent was seised of and entitled to the lands in the petition mentioned.

The petition further stated that the said affidavit was registered, as against said lands, in the office for registering deeds in Ireland, on the 10th of May 1853, pursuant to the provisions of the said Act; and that said judgment thereby became, and now is, a valid and legal charge affecting the respondent's estate in said lands.

The petition then stated that one Thomas Popham Luscombe, as an incumbrancer on the said lands, presented a petition for the sale of same in the Incumbered Estates Court, on or about the 31st of March 1853, and that a conditional order for sale was made thereon on the 18th of April following; but the petition stated that petitioner believed that a considerable time will elapse before the said lands can be sold in said Court, and before the petitioner could be paid the amount of the said judgment out of the proceeds of

said sale. The petition then stated that the respondent resides out of Ireland, but is in the receipt of the rents of the said lands, through his agent, Mr. Hugh Greene.

The petition then stated that the petitioner has applied to the respondent's said agent for payment of said judgment, but without effect, and that the whole of the judgment debt, besides costs, is due.

The petition then prayed that the judgment might be declared to be well charged on the said lands in the petition mentioned, and that it might be referred to the Master to take an account of the sum due to the petitioner for principal, interest and costs on foot of the judgment; and that a receiver might be appointed to receive the rents of the said lands until they should be sold in the Incumbered Estates Court; and that the rents to be collected should be applied in discharge of the sum to be found due to the petitioner, and his costs.

The Master made his decretal order upon the petition on the 8th day of August 1853, and thereby declared the petitioner's demand well proved, and that there was due to him, on foot of the said judgment, the sum of £138. 13s. 7d.; said sum consisting of the sum of £137. 5s. 11d., for which the judgment was recovered, and £1. 7s. 8d. for interest thereon, at £4 per cent., from the 22nd of April 1853, the date of the judgment, to the 22nd of July 1853; and it is declared by the said decretal order that the petitioner is entitled to interest on the principal sum of £137. 5s. 11d., at the rate of £4 per cent. per annum, until paid, and also the costs in this matter, when taxed and ascertained; and it was by the said decretal order of Master Brooke referred to the Receiver-master to appoint a receiver over the lands and premises in the petition and in the decretal order mentioned, upon his entering into security, &c., &c.; and that on service of said decretal order, the tenants should pay their rents and arrears to the receiver, &c.; and it was by said decretal order further declared that the receiver should from time to time, according as he should have funds applicable thereto, apply the same in payment of the petitioner's demand, the costs of this application, and the order and proceedings thereby directed.

1854.  
*Rolls.*  
HERBERT  
v.  
GREENE.  
*Judgment.*

1854.  
Rolls.  
HERBERT  
v.  
GREENE.  
Judgment.

The judgment in this case was entered on the 22nd of April 1853, and consequently, under the provisions of the 1st section of the 13 & 14 of *The Queen*, c. 29, was not any charge on the respondent's lands, nor could any proceeding have been taken on the said judgment as against the said lands, until the affidavit was registered, as provided by the 6th section of the Act.

The affidavit having been made and registered on the 10th of May 1853, the registration of such affidavit had the effect, under the 7th section, of a mortgage of the lands therein mentioned, and on the same day the petition was filed.

No objection having been made by the respondent, on the ground that the petition was filed on the same day that the affidavit was registered, it is unnecessary to offer an opinion whether, if it had been made, the petition could have been sustained.

The Master charges interest from the 22nd of April 1853, when the judgment was entered. It is not necessary to decide whether the interest commenced to accrue prior to the 10th of May 1853, when the affidavit was registered under the 6th section of the Act, as the interest from the 22nd of April to the 10th of May amounts to so small a sum.

I shall first consider the case as if there had not been any order for a sale of the lands by the Incumbered Estates Court; and secondly, what was the effect of the absolute order for a sale in that Court on the 6th of June 1853, after the filing of the petition.

First, if there had not been any absolute order for a sale by the Incumbered Estates Court, I apprehend the decretal order of the Master could not have been sustained. According to the general course and practice of this Court, in a foreclosure suit, or a suit to raise a charge affecting lands, by sale of the lands, an order is not made for the appointment of a receiver, unless under the following circumstances: first, where interest is due on the security, the Court usually requiring an affidavit that one year at the least is due; or, secondly, where the property is in danger: for example, if the lands are held under a lease, and head-rent has been permitted to remain unpaid and in arrear; or, thirdly, where there is reason to apprehend that the sum for which the

lands shall be sold will be insufficient to pay the incumbrances or charges thereon.

I have had inquiry made from Mr. Long and Mr. Darley, gentlemen well acquainted with the course and practice of the Court of Chancery, and I have been informed that the same rule prevails in that Court; and that in making up a foreclosure decree in the Court of Chancery, it is not of course to enter on the decree an order of reference for the appointment of a receiver, but that a case must be made at the hearing for such order, on some such grounds as I have stated.

It is also a well settled general rule of the Court not to pay any part of the principal of a mortgage or charge out of the rents and profits, or to appoint a receiver for that purpose. Where the fund ultimately turns out to be deficient for the payment of incumbrances, the rents and profits received by a receiver are applied towards the payment of such incumbrances, in addition to the produce of the sale; but the general rule is, as I have stated, not to pay any part of the principal of the charge or incumbrance out of the rents and profits.

The provision in the Sheriffs' Act to the contrary was an exception to the general rule; the appointment of a receiver under that Act being in the nature of an equitable execution, and in lieu of the *elegit*.

The decretal order of the Master (assuming that there had been no absolute order for a sale of the lands in the Incumbered Estates Court) would have been at variance with the settled course of the Court. First, because it appears by the 2nd schedule to that order that there was only £1. 7s. 8d. due for interest on the judgment from the 22nd of April to the 22nd of July 1853, and the very trifling additional sum which accrued from the 22nd of July to the 10th of August 1853, being the date of such decretal order; and under such circumstances there is no precedent for appointing a receiver for so trifling an arrear. Secondly, because there is no instance, previous to the decretal order of the Master in this case, where, upon such evidence as was before him, an order was made, referring it to the Master to appoint a receiver for the payment of the principal of the incum-

1854.

*Rolls.*

HERBERT  
v.

GREENE.

*Judgment.*

1854.  
*Rolls.*  
HERBERT  
v.  
GREENE.  

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Judgment.

brance. It is to be kept in mind that there was no allegation in the petition, and no evidence whatever laid before the Master, that there was reason to apprehend that the lands, when sold in the Incumbered Estates Court, would prove insufficient for the payment of the petitioner's demand, and all incumbrances.

It is therefore necessary to consider whether, where an absolute order for a sale has been made by the Incumbered Estates Court, a petition is, under the provisions of the Incumbered Estates Act, sustainable for the appointment of a receiver for the payment of the principal and interest of a charge or incumbrance out of the rents and profits.

The petition in this case was filed on the 10th of May 1853; the absolute order for the sale was made in the Incumbered Estates Court on the 6th of June following. If the petition had been for a sale, all proceedings for a sale would have been stayed, under the provisions of the 42nd section of the Act. I apprehend, however, that notwithstanding that section, an order for the appointment of a receiver might have been made, if any of the three states of facts which I have referred to had existed in this case. If an arrear of interest is due, which, previous to the Incumbered Estates Act, would have warranted the appointment of a receiver, it would be unreasonable that an incumbrancer should have to wait for the payment of such interest during the interval which might elapse between the absolute order for the sale and the sale in that Court. But I do not understand the equity which the petitioner's Counsel alleges arises from the 42nd section of the statute, and that because the petitioner cannot, in consequence of the provisions of that section, be paid by a sale in this Court, and that some time may elapse before he is paid in the Incumbered Estates Court, that therefore he is entitled to be paid the principal as well as interest of his demand out of the rents and profits. I am quite unable to understand that equity. If the Master's decretal order was right, it is easy to foretell the consequences which would follow from the establishment of such a precedent. According to the Master's decretal order, in all cases now pending in the Incumbered Estates Court, in which an absolute order for a sale has been made, every

incumbrancer (although not a shilling of interest may be due, and although the rents are applied by the owner to keep down interest) may file a petition and obtain a decretal order for the appointment or extension of a receiver, to pay the principal out of the rents and profits. The consequence of my affirming such a novel principle would be an enormous accumulation of costs in the distribution of the produce of sales.

I am therefore of opinion that, upon the evidence before the Master, the decretal order cannot be sustained.

The difficulty, however, which I have felt in the case, arises from an affidavit which was not before the Master, but which has been made by Mr. Hugh Greene, the agent of the respondent, and which was filed on the 27th of August 1853, subsequent to the decretal order.

Mr. Hugh Greene states in that affidavit that he receives the rents of the several estates of the respondent, for the purpose, in the first place, of paying the interest on a charge of £27,000, due upon the said estates, to the trustees of Lady Coventry, and the tithe rent-charge, and instalments on certain advances made by the Board of Works, for the drainage of the said lands; and Mr. Hugh Greene further states by the said affidavit, that any balance of the rents, after payment of the interest on said charges, expenses of management, poor-rates and allowances, is insufficient for the payment of the interest on judgments and other charges affecting the said lands, which are prior to the judgment debt due to the petitioner in this matter.

According, therefore, to the respondent's own showing, the rents and profits are insufficient to pay the interest of the charges and incumbrances prior to the petitioner's demand; and if so, there is reason to apprehend that the estates when sold may be insufficient to pay the petitioner and all the other incumbrancers; and that is one of the class of cases in which the Court will appoint a receiver, to secure the rents and the due application of them.

In strictness, the petitioner is not entitled to use an affidavit before this Court, on the appeal, which was not before the Master; but as it would lead to expense to send the case back to the Master

1854.  
*Rolls.*  
HERBERT  
v.  
GREENE.  
*Judgment.*

1854.  
*Rolls.*  
HERBERT  
v.  
GREENE.  
*Judgment.*

to consider the new evidence, it will be better for me to dispose of the case, so far as it can be satisfactorily disposed of at present.

I do not think it would be reasonable to remove Mr. Hugh Greene from the receipt of the rents, under the circumstances detailed in his affidavit, if he is willing to act as receiver; and I shall, therefore, if he will accept the office, appoint him receiver, he entering into security by recognizance with two sufficient sureties, as in such cases usual; and I shall direct that he shall not make any further payments except the ordinary outgoings, without the order of the Court; and I shall direct the further consideration of the appeal and the question of costs to stand over until after the sale in the Incumbered Estates Court, and the allocation of the produce of the sale in that Court.

It appears to be quite clear that I ought not at present to affirm the decretal order, so far as it directs the payment by the receiver of the rents received by him in payment of the petitioner's demand and costs, as such order would affect the rights of the trustees of Lady Coventry and the other incumbrancers, prior to the petitioner, to the payment of whose interest the rents are applied.

The allegation of the petitioner's Counsel before me (which was not made before the Master) is that the fund will prove deficient. The allegation of the respondent's Counsel is that the produce of the sales in the Incumbered Estates Court will be ample to pay off all incumbrances, including the petitioner's. I feel some difficulty about disposing of the appeal, until the sufficiency or insufficiency of the estates to pay off incumbrances shall be ascertained by the sale in the Incumbered Estates Court. The Master's decretal order, on the evidence before him, appears to have been erroneous, and I find no equity stated on the face of the petition, there having been only nineteen days' interest due when the petition was filed, and no allegation in the petition of an insufficient fund, or that the property was in danger of loss. However, the affidavit of the respondent's agent creates the difficulty I have stated; and I think the appeal, and more especially the question of costs, can be more satisfactorily disposed of by me, when the result of the sale in the Incumbered Estates Court shall be known, and the sufficiency or insufficiency of the fund ascertained.

[The MASTER OF THE ROLLS, having given judgment, was then for the first time informed that a receiver had been appointed in another cause, under an order of the Lord Chancellor, made previously to the decretal order of the Master, of the 8th of August 1853, and of which neither the Master nor the Court had been informed. His Honour having called for the order or orders appointing or extending the receiver made in any causes or matters, said]:—

1854.  
*Rolls.*  
HERBERT  
v.  
GREENE.  
*Judgment.*

It appears that on the 30th of July 1853, an order of reference was made, on consent, by the Lord Chancellor, in the cause of *Thomas Greene v. John Greene* (the respondent in the present matter), referring it to the Receiver-master to appoint a receiver. On the 18th of August 1853, a report was made, under the Lord Chancellor's order, appointing Hugh Greene, Esq., to be receiver over the respondent's lands. On the 19th of November 1853, an order was made in the judgment matter, in which Thomas Popham Luscombe was petitioner and the said John Greene respondent, extending the receiver to that matter. The decretal order of Master Brooke, referring it to the Receiver-master to appoint a receiver, bears date the 8th of August 1853, and was of course irregular, in consequence of the Lord Chancellor's previous order of the 30th of July, but the Master was not informed of the Lord Chancellor's order, and the course was also adopted of arguing the appeal to this Court, without any intimation to me of such order of the Lord Chancellor. The Master and I have much reason to complain of such a course of proceeding. If the Master had been informed of the order of the 30th of July, he would have made no order of reference to appoint a receiver. Whether the Master would have made an order to extend the receiver to be appointed under the Lord Chancellor's order, when he should be so appointed, is a matter of doubt—some of the Masters holding that they have no jurisdiction to make an order to extend a receiver from a cause or matter not referred to them under the 15th section of the statute, while others of the Masters exercise such jurisdiction; but it is quite clear that the Master and the Court should have been informed of the fact of the Lord Chancellor's order.

1854.  
*Rolls.*  
 HERBERT  
*v.*  
 GREENE.  
 ———  
*Order.*

The order which I shall make, under the circumstances, will be entitled in the cause and matter to which I have referred, and in this matter, and will be as follows :—

That the receiver appointed in the first matter, and extended to the second matter, be extended to this matter, and that the further consideration of the appeal in this matter shall stand over until the lands of the respondent, directed by the Court for the Sale of Incumbered Estates to be sold, by order of the 6th of June 1853, shall have been sold, and the produce thereof allocated; and the Court doth reserve further order, and the question of the costs of the appeal.

*Jan. 16.*  
*April 16.*

ELLIS *v.* O'NEILL.

In 1731, the lands of B. and M., with so much of the tithes as were vested in the lessor, were demised for fifty-one years. In 1764, F. became entitled to the interest in the lease, and so continued until 1782, when it expired. The lands of B., C. and M. were demised to F., for lives, with covenant for perpetual renewal, in 1751.

THE facts of this case, which came before the Court on objections to the Master's report, are fully stated in the judgment.

Mr. *Deasy* and Mr. *Berkeley*, in support of the objections, argued that the construction put by the Master on the 20th section of the 1 & 2 *Vic.*, c. 109, would nullify the policy of the Legislature; for in every case where a lease of the tithes was made to a third person, although it did effect a union between the tithes and the lands, no period of time would create an exception. That the exemption in the section was confined to a demise by the owner of the tithes to

In 1766, the tithes of B., C. and M. were demised for lives, with covenant for perpetual renewal. In 1813 and 1832, renewals of the lease were granted, the interest of which was vested in A. In 1834, a tithe composition was made in the parish where the lands were situate, and the commissioners certified that a certain proportion of the tithes was payable to those claiming under the lease of 1766, and the remainder to the vicar. There was no evidence of the payment of tithes for sixty years previous to 1834.—*Held*, overruling objections to the Master's report, that the right of exemption from the payment of tithes, under the 1 & 2 *Vic.*, c. 109, s. 18, was not established, the case falling within the exception in sec. 20.

The exception in that 1 & 2 *Vic.*, c. 109, s. 20, is not confined to the case of a demise of tithes to the owner or occupier of the lands, in respect of which the tithes are payable.

the owner of the lands: *Denny v. Duke of Devonshire* (a). The words, "with" or "to," introduced into the section, would make that construction perfectly clear, and would prevent the owner of the tithe from interposing a perpetual protection for himself against the bar of the statute, as Lord Trimleston sought to do in this case.

1854.  
Rolls.  
ELLIS  
v.  
O'NEILL.  
Argument.

Mr. *F. Fitzgerald* and Mr. *W. Smith*, in support of the Master's report, argued that Lord Trimleston was precluded by the terms of the lease from proceeding to recover the tithe, so long as the rent was paid, and therefore the case did not fall within the 18th section; and they relied on the plain grammatical construction of the 20th section, aided by the plain meaning of the clause in the corresponding English statute, 1 & 2 *W.* 4, c. 100.

**The MASTER OF THE ROLLS.**

The petition in the first matter was presented under the 30th section of the Tithe Rentcharge Act (1 & 2 of *The Queen*, c. 109), for the appointment of a receiver over the lands of Moher, Ballinclare, Gortgallon and Clonadra, situate in the parish of Clontusker and county of Roscommon, for the payment of tithe rentcharge, alleged by the petitioner to be payable out of the said lands. The respondents in the first matter filed the petition in the second matter under the 16th section of the statute, alleging that the said lands were tithe-free, and not rightfully charged with, or subject to, the tithe composition applotted on said lands. On the 15th of April 1840, an order was made under the 16th section of the Act, by Sir M. O'Loughlen, in the matter, of which the second is a revival, whereby it was referred to the Master to inquire and report whether the lands of Moher, Ballinclare, Gortgallon and Clonadra, situate in the parish of Clontusker and county of Roscommon, or any, and which of them, would have been rightfully charged with the payment of composition in lieu of tithe, if the said Act of the 1 & 2 of *The Queen*, c. 109, had not passed; and whether the right of exemption from the payment of tithes existed and was acted upon at the time, or within one year next before the establishment of a compo-

April 16.  
Judgment.

(a) 1 Ir. Ch. Rep. 657.

1854.  
*Rolls.*  
 ELLIS  
*v.*  
 O'NEILL.  
*Judgment.*

sition in lieu of tithes, in the parish of Clontusker, in the county of Roscommon, in the petition mentioned; and it was by the said order further directed, that a motion to show cause against a conditional order in the first matter, bearing date the 10th of January 1840, for the appointment of a receiver for the payment of the tithe rentcharge, should stand over until the Master should have made his report. The proceedings having abated, the order of the 15th of April 1840 was renewed on the 24th of April 1850. The report has been made under that order, on the 10th of December 1853, that is, between thirteen and fourteen years after the original order of reference; and no explanation has been given to the Court as to the delay in making the report. I suggested a course of procedure which would render it impossible that cases should remain in the Master's office for such a period, but no attention has been paid to those suggestions.

The findings in the report are as follow:—"I find that the lands of Moher, Ballinclare, Gortgallon and Clonadra, respectively situated in the parish of Clontusker and county of Roscommon, would have been rightfully charged with the payment of composition in lieu of tithes, if said Act of the 1 & 2 of *The Queen*, c. 109, had not passed; and I further find, that although the parties went into evidence as to the fact of the payment of tithe in each of the said several lands, during the sixty years next preceding the establishment of a composition in lieu of tithe in the said parish, there was no sufficient evidence to show that any tithes had been paid during any part of that period, out of Moher, Ballinclare or Clonadra. But Lord Trimleston, having proved before me that all the tithes of the said parish had been, by indenture of renewal, bearing date the 1st of August 1832, in the schedule to the report referred to, demised to Richard Armstrong, sen., Richard Armstrong, jun., and Charles Armstrong, and which lease was, at the time of the making of such composition, and still is, subsisting: I find that the right of exemption from the payment of tithes did not exist, and was not acted upon as to said lands, or any of them, or any part thereof, at the time, or within one year next before the establishment of a

composition in lieu of tithes in the said parish of Clontusker in the county of Roscommon."

No question has been raised as to Gortgallon, the actual payment of tithes out of that denomination having been proved.

Three objections have been taken to the findings in the report, by the petitioner in the second matter. The first objection states that the Master should have found and reported that the lands of Moher, Ballinclare and Clonadra, would not have been rightfully charged with the payment of composition in lieu of tithes, if said Act of the 1 & 2 of *The Queen* had not passed.

The second objection states that the Master should have found and reported that the right of exemption from the payment of tithes did exist as to the said lands of Moher, Ballinclare and Clonadra respectively, at the time of the establishment of a composition in lieu of tithes in the said parish.

The third objection states that the Master should have found and reported that the right of exemption from the payment of tithes was acted upon, as to the said lands of Moher, Ballinclare and Clonadra respectively, at the time of the establishment of a composition in lieu of tithes in said parish.

The question arising on the report, and the objections to it, is, whether the fact that the tithes of the three denominations of land had been demised by deed for lives, as in the report, and hereinafter mentioned, brought the case within the proviso in the 20th section of the statute?

The facts of the case appear to be as follow :—On the 28th of August 1766, Henry Lord Kingsland, in consideration of £600, demised to Ulick Burke the impropriate tithes in the county of Roscommon, as therein particularly described, including the tithes of the three denominations of Moher, Ballinclare and Clonadra, to hold for three lives, subject to the annual rent of £240; and said lease contained a covenant for perpetual renewal. The estate and interest of Lord Kingsland became vested in Nicholas Lord Trimleston; and the estate and interest of the lessee Ulick Burke became vested in Andrew Richard Martin; and some of the lives in the last preceding renewal having died, by indenture of renewal, bearing date the 31st

1854.

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*Judgment.*

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*Rolls.*  
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*Judgment.*

of March 1813, and made between the said Nicholas Baron Trimleston, of the first part, and Andrew Richard Martin, of the other part, the said Lord Trimleston granted a renewal of said original lease to said A. R. Martin. By indenture of the 29th of September 1814, Andrew Richard Martin, in consideration of £5000, assigned his interest in the said original lease, and the renewals thereof, to Richard Armstrong the elder. The interest of Richard Armstrong the elder having become vested in him and in his sons Charles Armstrong and Richard Armstrong the younger, and the estate and interest of Nicholas Lord Trimleston having vested in Thomas Lord Trimleston, and the last renewal having been, in some respects, informal, the said Thomas Lord Trimleston, by indenture, dated the 1st of August 1832, executed a renewal to the said Richard Armstrong, sen., Richard Armstrong, jun., and Charles Armstrong, of the said impropriate tithes, including the tithes of the said three denominations, for three lives, at the rent of £221. 10s. 9d. British.

The interest in that renewal is now vested in the respondents in the second matter, and they claim to be entitled to the impropriate tithes of the parish of Clontusker thereunder.

As to two of the denominations, viz., Moher and Ballinclare, they had been demised on the 21st of February 1731, by Henry Lord Kingsland, to one Richard Berford, for fifty-one years, together with so much of the tithes as were vested in Lord Kingsland. That lease became vested in one Robert Fetherston, in the year 1764; and the lease of 1731 expired in 1782.

Robert Fetherston became the lessee, under Lord Kingsland, of the four denominations of Moher, Ballinclare, Gortgallon and Clonadra, by a lease for lives renewable for ever, bearing date the 17th of December 1751, and the interest in which lease is vested in the petitioners in the second matter.

It has been therefore contended, on the part of the respondents in the second matter, that as to two of the denominations, viz., Moher and Ballinclare, Robert Fetherston was entitled to the tithes and to the lands up to 1782, when the lease of 1731 expired, which was within sixty years prior to the establishment of a tithe composition within the parish of Clontusker, and that therefore the petitioners

in the second matter have not established an exemption from payment of tithes as to those two denominations (a).

It is not necessary that I should offer any opinion as to the effect of the facts which I have last adverted to. At the same time, as under the 18th section of the Act, non-payment for thirty years prior to the establishment of a tithe composition operates *prima facie* to discharge the lands, I do not exactly see the distinction between the case as to the two denominations of Moher and Ballinclare, and the remaining denomination of Clonadra.

I shall therefore consider the case, as to the three denominations of Moher, Ballinclare and Clonadra, with respect to which denominations no evidence was laid before the Master of payment of tithe thereout, for a period of sixty years previous to a tithe composition in said parish. The certificate of tithe composition bears date the 23rd of January 1834; and by that certificate, Wm. Hampton, the commissioner appointed under Lord Stanley's Act, certified that the true and just amount of composition, for all tithes whatever, within the said parish, is £229. 18s. 3½d. sterling, by the year, of which sum £186. 7s. 4½d. is due and payable to Messrs. Richard Armstrong, Charles Armstrong and Richard Armstrong, jun.; viz., half of the tithes of certain denominations mentioned in the certificate, and the whole of the tithes of Moher, Ballinclare and Clonadra, and other denominations mentioned in the certificate: and he certified that the remainder of said sum of £229. 18s. 3d. was payable to the vicar of the parish.

Counsel on the part of the petitioner in the second matter contend that the three denominations of Moher, Ballinclare and Clonadra, are proved to be discharged from payment of tithe under the 18th section of the 1 & 2 of *The Queen*, c. 109, by the fact of non-payment of tithes for sixty years previous to the establishment of a composition in lieu of tithes in the parish; and that the lease of 1766, and the several renewals thereof, including the renewal of the 1st of August 1832, by Thomas Lord Trimleston to Richard Armstrong, sen., Richard Armstrong, jun. and Charles Armstrong, do not bring the case within the 20th section, and that by the true

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(a) See *Onge v. Gardiner*, 4 M. & W. 496.

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*Judgment.*

construction of the 20th section the lease of the tithes must be to the owner or occupier of the land, and that the exception in that section is not applicable, unless where the non-payment of tithes arose from the union of the ownership in the lands and in the tithes in the same person.

Accordingly, in answer to a question put by me, *Mr. Deasy*, Counsel for the petitioner in the second matter, insists, that if a lease had been made by Lord Trimleston on the 1st of January 1774, for sixty-five years (that is, upwards of sixty years prior to the establishment of a composition for tithes in the parish of Clontusker, which lease would have expired shortly after the passing of the 1 & 2 Vic., c. 109), Lord Trimleston, the reversioner, would be barred, although rent was regularly paid to him up to the period of the expiration of the lease.

On the other hand, Counsel for the respondents in the second matter contend, and the Master has so decided, that the 20th section is not confined to the case of a demise to the owner of the land, although it, of course, would include that case.

The question is one of considerable importance to the owners of impropriate tithes, who have demised the same; as according to the argument of the Counsel for the petitioner in the second matter, the regular receipt of rent by such owner is of no avail, and if the lessee has omitted to enforce the payment of the tithe, the rights of the reversioner may be barred.

The 18th section, so far as it relates to a claim of an absolute exemption from tithes, is as follows:—"That all prescriptions and claim, of or to any exemption from or discharge of tithes, shall, in all cases whatever, be sustained and be deemed good and valid in law, upon evidence showing, in cases of claim to exemption or discharge, the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the establishment of a composition for such tithes, under the Acts for that purpose made; unless, in case of claim to exemption or discharge, the render or payment of tithes, or of money, or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years; or it

shall be proved that such enjoyment was had by some consent or agreement expressly made or given for that purpose, by deed or writing." The rest of the section is not material to the present case. The 20th section contains the following proviso:—"Provided always, and be it enacted, that the provisions hereinbefore contained, with respect to the establishment of claims of or for any modus or exemption from or discharge of tithes, shall not extend to any case *where the tithes of any land shall have been demised by deed, for any term of life or number of years*, or where any composition for tithes shall have been made, by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, *and such demise or composition shall be subsisting at the time of the passing of this Act*, nor to any suit for establishing a claim to tithes now pending."

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The present case falls in terms within that proviso, the tithes having been demised by deed of 1766 for lives, by Lord Kingsland to Ulick Burke; and renewals having been granted from time to time. The last renewal was executed, as I have already stated, on the 1st day of August 1832, by Thomas Lord Trimleston to Richard Armstrong, sen., Richard Armstrong, jun., and Charles Armstrong, for lives still subsisting.

The rule laid down by Judge Burton, in *Warburton v. Ivis*, as to the construction of statutes, was cited and approved of by Baron Parke, in *Doldenay v. Colt* (a), and by Lord Justice Bruce, in *Gundry v. Penniger* (b). Judge Burton said, "I apprehend it to be a rule, in the construction of statutes, that in the first instance the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention, or any declared purpose, or if it would involve any absurdity, repugnance or inconsistency, in its different provisions, the grammatical sense must then be modified, extended or abridged, so as to avoid such an inconvenience, but no further."

The grammatical sense of the words of the 20th section, which the Master has adopted, does not appear to me to be contrary to,

(a) 1 Tyr. & Gr. 334.

(b) 1 De G., M'N. & G. 505.

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or inconsistent with, any expressed intention, or any declared purpose of the statute; nor does it, in my opinion, involve any absurdity, repugnance or inconsistency in its different provisions. I am therefore of opinion that the decision of the Master was right.

Independently, however, of the grammatical and natural construction of the language of the section, there appear to be strong grounds for holding the decision of the Master to be right.

The 20th section of the 1 & 2 Vic., c. 109, was taken from the Act in force in England (the 2 & 3 W. 4, c. 100, s. 4). The latter section is as follows:—"Provided also, and be it further enacted, that the Act shall not extend or be applicable to any case where the tithes of any lands, tenements or hereditaments, *shall have been demised for any term of life or number of years*, or where any composition for tithes shall have been made, by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this Act, *and when any action or suit shall be instituted for the recovery or enforcing the payment of tithes in kind, within three years after the expiration, surrender or other determination of such demise or composition.*"

The last clause of this section (a) is omitted from the 20th section of the 1 & 2 of *The Queen*.

It appears to me to be clear, and free from all manner of doubt, that the 4th section of the 2 & 3 W. 4, c. 100, is not confined to the case of a demise of the tithes to the owner or occupier of the land in respect of which the tithe was payable; but that it includes the case of a demise of the tithes to any person, provided the reversioner institutes an action or suit within three years after the expiration, surrender or other determination of the demise—that is, the exemption from the operation of the 1st section of the 2 & 3 W. 4, c. 100 (which corresponds with the 18th section of the 1 & 2 of *The Queen*, c. 109), by reason of a demise by deed, for life or years, is conditional on the reversioner instituting a suit within three years after the determination of the lease.

(a) The clause in italics.

If this be so, the omission of the latter words of the 4th section of the 2 & 3 *W. 4*, c. 100, from the 20th section of the 1 & 2 of *The Queen*, would make the exemption in the latter section unconditional. If the construction of the 2 & 3 *W. 4*, c. 100, s. 4, is what I have stated, which I have no doubt whatever that it is, the Court would not be justified in construing the parts of the section in the corresponding statute in force in Ireland, which are in the same words, in a different manner.

Whatever is the construction of the section in the former Act is the construction of the section in the latter Act, save that by the terms of the 4th section of the 2 & 3 *W. 4*, c. 100, the reversioner, in order to take advantage of the exemption, must institute a suit or action within three years after the expiration, surrender or other determination of the lease.

It may, no doubt, be inconvenient, that in cases of leases by deed, of tithes for lives or years, subsisting at the time of the passing of the 1 & 2 of *The Queen*, c. 109, the provisions of the 18th section are entirely excluded by the effect of the 20th section; but on the other hand, it would be very unjust that a person who had demised tithes for lives or years, before the establishment of a tithe composition, and who had been regularly paid the rent under the lease, should be barred, at the termination of the lease, of all right to the tithes, by reason of his tenant having permitted the tithes to remain unpaid.

The language of the 20th section of the 1 & 2 of *The Queen* is general, and there is nothing in the section to justify the Court in confining the meaning of the words to a demise to the owner or occupier of the land, unless all rules of grammar are violated. That construction is not the construction of the very same words in the corresponding Act in force in England, and I am therefore of opinion that the decision of the Master was right.

It has been suggested that although Lord Trimleston may not be bound by the non-payment of tithes for sixty years, yet that his lessees are. I apprehend that is not the case. The provisions of the 2 & 3 *W. 4*, c. 100, appear to have been taken from the Prescription Act of the 3 & 4 *W. 4*, c. 71, from which statute tithes were

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*Judgment.*

excluded by the 1st section; and according to the case of *Bright v. Wather* (a), unless the enjoyment for twenty years under that statute gives a good title against all persons, it will not confer any title at all.

The ground of that decision appears to me to be applicable to the present case.

Under these circumstances, I am of opinion that the objections taken to the report of the Master should be overruled, and the petition in the second matter dismissed, and that it should be referred to the Master, on the application of the petitioner in the first matter, to appoint a receiver.

I must add that the course of referring to the Master questions such as arise in the present case, which are mixed questions of law and fact, appears to me to be objectionable. When this case was referred to the Master on the 15th of April 1840 (nearly fourteen years ago), if the petitions in the first and second matters had been directed to stand over, to enable the petitioner in the first matter to bring an action at law, the question of fact of the non-payment of tithe for sixty years, if that fact was disputed, and the question of law arising from the lease of the tithes by the lease of 1766, and the several renewals thereof, including the last renewal in 1832, would have been decided many years ago by the tribunal most proper to decide them—a Court of Law. But after the lengthened litigation in this case, I think it will be better for me to decide the question of law without further delay, and without sending a case to a Court of Law.

The petitioners in the second matter will suffer no injustice from this course, as an appeal lies to the Lord Chancellor, and a case may be sent by his Lordship to a Court of Law, if he feels any difficulty in the case.

I sent in an order, to the effect I have stated, during the last Vacation, after the Court rose.

(a) 4 Tyr. 508; S. C. 1 Cr. M. & Rosc. 211.

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MOLYNEUX v. SCOTT.

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THOMAS GIBBONS, being seised of real and personal estate, devised the same, by his will, to James Smith Scott and Echlin Molyneux, upon certain trusts; and he bequeathed certain legacies, and among others, a legacy of £100 to the defendant William Burke Overend. Echlin Molyneux alone proved the will, and on the 22nd of June 1849, filed a bill for the purpose of obtaining the opinion of the Court upon certain questions on the will, and for an administration of the assets. A decree to account was pronounced on the 5th of June 1850. W. B. Overend filed a charge for his legacy under the decree. The Master made his report on the 21st of August 1851, and a final decree was pronounced on the 19th of January 1852, by which all the parties plaintiffs and defendants were decreed their costs out of the general assets. W. B. Overend was reported a debtor to the assets in the sum of £36. 4s., being the amount of rent received by him for the testator. An action was brought in the Court of Exchequer by the executor. The defence set up was, that the testator had in his last illness made him a present of that sum. A witness proved that the testator, who was deaf and dumb, had intimated by signs that he wished Overend to retain the sum for the defendant.

On the 10th of February 1853, Overend's solicitor called for an account of the assets. An account was immediately furnished, in which the executor took credit for a sum of £84. 14s. 5d., the costs of the action against Overend, and showed a balance of £150. 13s. 3d. applicable to the payment of the pecuniary legatees.

The general rule is, that though there be a decree for the administration of assets, a creditor of the testator or intestate will not be restrained by injunction from proceeding at law to make the personal representative liable *de bonis propriis*; but where a legatee, who has proved in the Master's office under the decree, brings an action at law against the executor for the legacy, the Court will enjoin him, though the judgment in the action should be *de bonis propriis*; for the Court, by its decree, has taken upon itself to decide upon the question of assets, without which the plaintiff at law cannot recover, and

will not permit that question to be tried at law.

To make an executor liable at law for a legacy *de bonis propriis*, there must be an express promise in writing, and assets or some other consideration.

The cases on the latter question reviewed and considered.

*Semble*—On a plaint for a legacy, against the defendant as executor, and not averring that the defendant promised in writing to pay the legacy, the judgment should be *de bonis testatoris*.

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Statement.

Overend's solicitor objected to the credit claimed for costs. There was a correspondence between the parties, and eventually Overend brought an action at law against the executor. The plaint is set out at length in the judgment of the MASTER OF THE ROLLS.

The plaintiff, the executor, now moved for an injunction to restrain Overend from further proceeding in the said action for the legacy, and for the costs of the motion.

Argument.

Mr. Martley and Mr. Hughes, in support of the motion, contended that the effect of the action at law was to withdraw from the Court the administration of the assets, and the executor might thus be harassed by a number of actions, which could end only in costs. If the action was allowed to proceed, a general principle would be established, and a legatee would be allowed to bring an action in every case where there was a suit for the administration of assets, although it might turn out, on the account being taken, that there would be no assets available for payment of the legacies. Such might be the result in the present case, for all the defendants in the suit were decreed their costs, which were yet unprovided for. They cited *Graham v. Maxwell* (a); *Williams on Executors*, p. 1647.

Mr. Deasy, against the motion, contended that the reason for restraining a creditor from proceeding at law for recovery of his demand was, that by doing so he might interfere with the due administration of the assets in this Court, and by recovering a judgment *de bonis testatoris*, he might deprive other creditors of their fair proportion of the assets; but the Court never interfered when the object of the action at law was to make the executor personally liable, and to obtain a judgment *de bonis propriis*: *Belmore v. Belmore* (b); *Powell v. Powell* (c). That was the object, and would be the result of the action in this case. The utmost length the Court could go, under the authorities, would be to restrain the legatee from enforcing his judgment against the

(b) 1 M.N. &amp; Gor. 71.

(b) 12 Ir. Eq. Rep. 493.

(c) 12 Ir. Eq. Rep. 501.

assets, but it could not restrain him from enforcing it against the executor personally.

**The MASTER OF THE ROLLS.**

The facts of this case are shortly these:—On the 5th of June 1850, a decree to account was pronounced in the present suit, which was a suit instituted by Echlin Molyneux, Esq., the executor of Andrew Thomas Gibbons, deceased, for the administration of his testator's assets. On the 21st of August 1851, the Master made his report under the decree, and on the 19th of January 1852, a final decree was pronounced. The defendant Overend, who claims to be a legatee of the testator, proved his legacy before the Master, and is a party to all the proceedings in the cause. It appears that Mr. Molyneux paid some of the legacies, but he did not pay Overend's legacy, because he alleged that Overend was a debtor to the assets in the sum of £36. 4s., for rent received on account of the testator; and it appears from the Master's report that he thought Overend was a debtor, for he reported him as such. However, after the report, an action was brought by Molyneux against Overend for the amount of the debt to the estate, and the case was tried before a jury. The jury came to a different conclusion from the Master, and found in favour of Overend. Of course it is not for me to say whether that verdict was right or wrong—I must take it as I find it, as establishing the fact that Overend is not a debtor to the estate. It appears that subsequently to the trial, Overend applied to Mr. Molyneux for payment of the legacy, or a proportional part thereof. Mr. Molyneux, on the 10th of February 1853, furnished an account, in which on one side he charged himself with the assets received, as appeared by the Master's report, and on the other side adopted the credits in the Master's report. The effect of the final decree was that any surplus of assets which appeared in the Master's report was to be subject to the claims of the different parties for costs, which were to be paid before the legacies. Mr. Overend's solicitor having applied to Mr. Molyneux, a correspondence took place, which I need not particularly refer to. The substance of it appears to have been

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that the solicitor for the former demanded payment of the legacy, and that Mr. Molyneux stated that there was, according to the account which was furnished, only £150 available for payment of all the legacies. At length an action at law was brought by Overend against Mr. Molyneux for the legacy—a course unusual in this country; but which action has been brought, I presume, upon the authority of the cases to which I shall hereafter refer. The application now before me is for an injunction to restrain Overend from proceeding with that action, there having been a decree in this Court for the administration of the assets.

The first question which arises is, whether the judgment, when recovered in the action at law, should be a judgment *de bonis testatoris* or *de bonis propriis*? If it would be a judgment *de bonis testatoris*, according to the authorities, all of which, I believe, were referred to by me in the cases of *Belmore v. Belmore* (a), and *Powell v. Powell* (b), I am bound to grant the injunction. I am of opinion that the frame of the plaint would only enable the plaintiff to enter upon it a judgment *de bonis testatoris*.

The plaint states that “The defendant is the *acting executor* of Andrew Thomas Gibbons, deceased. That the said A. T. Gibbons, by a codicil to his last will and testament (which codicil was duly published and executed, and bears date the 23rd of July 1842), gave and bequeathed to the plaintiff, William B. Overend, a sum of £100 sterling, and of said last will nominated and appointed the said Echlin Molyneux an executor. That the said Echlin Molyneux took upon himself the burthen and execution of said will, and duly proved the same in common form of law, and assented to the bequests therein contained. That divers goods, chattels and effects of the said Andrew Thomas Gibbons afterwards came to the hands of the said Echlin Molyneux, *as such acting executor*, which said goods, chattels and effects were more than sufficient to satisfy and pay all the just debts, funeral and testamentary expenses and legacies of the said Andrew Thomas Gibbons, deceased, of which the said Echlin Molyneux had notice. And the plaintiff further says, that the said Echlin Molyneux afterwards expressly

(a) 12 Ir. Eq. Rep. 493.

(b) 12 Ir. Eq. Rep. 501.

admitted to the plaintiff that he had then in his hands, *as such acting executor as aforesaid*, certain moneys had and received by him to the use of the plaintiff; that is to say, certain assets of the said testator, Andrew Thomas Gibbons, sufficient to pay a certain rateable proportion of plaintiff's legacy, to wit the sum of £100 sterling. And the plaintiff further says that the said Echlin Molyneux being, as such executor, so liable to pay the plaintiff the said legacy, the said Echlin Molyneux, in consideration thereof and of the premises, afterwards undertook and promised the plaintiff to pay him the said sum of £100 on request, but did not pay the same or any part thereof. And the plaintiff says that the said Echlin Molyneux is, *as such executor*, indebted to him, under the circumstances aforesaid, in the said sum of £100. And the plaintiff prays judgment against the said defendant, to recover the said sum of £100 and his costs of suit."

The whole frame of the plaint is against the defendant as executor, and I think the Court of Law would not hold that judgment *de bonis propriis* could be entered on a document so framed. The plaint has, I believe, been framed in this way to prevent the defence of the Statute of Frauds. It is enacted amongst other matters by the 2nd section of that statute (7 W. 3, c. 12), that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person thereto by him lawfully authorised.

There is no pretence in this case that there was a promise in writing; and the plaint therefore was framed in this skilful manner, with the intention, I suppose, of preventing a plea founded on that statute, which would be a bad plea if the plaint would only warrant a judgment *de bonis testatoris*. I am of opinion that the judgment in this case should be a judgment *de bonis testatoris*; and if so, it is clear, upon the authorities referred to in the cases I have mentioned, that an injunction should be granted. However, I shall now consider the case on the assumption that the judgment which should

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be entered on the plaint would be a judgment *de bonis propriis*, as of course I cannot say with certainty what judgment could be properly entered by a Court of Law on the plaint; and I am of opinion that, even though the judgment to be entered on the plaint would be a judgment *de bonis propriis*, I am bound, under the circumstances of the present case, to grant an injunction to stay the action at law.

I shall now proceed to consider the cases at law in which actions have been brought for legacies, and the legal principles established by those cases. In the case of *Rann v. Hughes* (a), the declaration stated that the intestate died possessed of effects sufficient to pay the sum for which the action was brought, which had been referred to arbitration, and for which an award was made, but there was no distinct averment of assets properly applicable to pay the demand (b). The declaration also stated that administration had been granted to the defendant, and that the sum of money was unpaid, "by reason of which premises the defendant, as administratrix, became liable to pay the plaintiffs the said sum, and being so liable, she, in consideration thereof, undertook and promised to pay." There was a verdict for the plaintiff on the plea of *non assumpsit*, and judgment was entered against the defendant *de bonis propriis*; and the question on writ of error was, whether after verdict sufficient matter appeared on the declaration to warrant the judgment against the defendant in her personal capacity? It was assumed after verdict that the promise was in writing (c), which the Statute of Frauds requires it should be, but there was no consideration for the promise stated in the declaration, and the judgment was reversed, the House of Lords holding that, there being no consideration, the promise was *nudum pactum*. It was argued in that case that by the effect of the Statute of Frauds the law was altered, and that an executor was liable personally if there was a promise in writing, although there was no consideration; but it was decided by the House of Lords that although the statute required a promise in writing, to charge an

(a) 7 T. R. 350.

(b) See Lord Mansfield's observations on this case in *Hawkins v. Saunders*, Cowper's Reports, 291.

(c) See Cowper's Reports, 289.

executor upon a special promise to answer damages out of his own estate, the law in other respects was unaltered, that a consideration was necessary, and that in the absence of any consideration the action was not sustainable.

The next case to be considered, although not the next in point of time, is *Deeks v. Strutt* (a). That case did not turn on the pleadings; it went to trial. If it had turned on the pleadings, the promise stated in the declaration would have been inferred to have been an express promise. The question in the case was whether, there having been no express promise by the executor, but merely an alleged implied promise arising from the payment of former gales of the annuity, for which the action was brought, and it appearing that there were sufficient assets for payment of it, the executor was liable? It was held that he was not.

The result of the two cases of *Rann v. Hughes*, and *Deeks v. Strutt*, was that an express promise, without the existence of assets or some other consideration, would not make the executor liable personally, nor would assets, without an express promise, make him so liable. In order to create a personal liability in him, both must be combined, *i. e.*, assets or some other consideration, and an express promise—and the express promise must, under the Statute of Frauds, be in writing.

The case of *Athyns v. Hill* (b) arose on demurrer. The declaration stated that "James Clarke, &c., by his last will, &c., did give and bequeath to the plaintiff's wife the sum of £60, &c., and of his last will and testament made the said (defendant) Charles Hill sole executor, &c., and the said Charles Hill took upon himself the burden and execution of the said will. That divers goods and chattels, &c., afterwards, &c., came to the hands of the said Charles Hill, as executor of the said James Clarke, which said goods and chattels were more than sufficient to satisfy and pay all the just debts and legacies of the said James Clarke, &c., of which the said Charles Hill then and there had notice. By reason of which said premises, the said Charles Hill became liable to pay to the plaintiff the said sum of £60, and being so liable, he the said Charles Hill, in

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(a) 5 T. R. 690.  
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(b) Cowp. 282.  
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consideration thereof, afterwards, &c., undertook and faithfully promised to pay to the plaintiffs the said sum of £60, whenever," &c. In that case, as in this, the declaration stated that the defendant was liable as executor. Lord Mansfield, in giving judgment, said:—"A legatee who sues at law must clearly prove that the defendant has received assets, which cannot be done except in a case so clear as not to admit of litigation. In this respect, the discovery and account given in a Court of Equity is so preferable a remedy, that it has drawn all suits thither; and therefore in fact, there is scarce an instance of a legatee attempting to sue at law." . . . "This is a case in which the declaration particularly states that assets have been received by the defendant, the executor, more than sufficient to pay all the testator's debts and legacies. If so, it most undoubtedly must be taken, upon the pleadings, that there was sufficient to discharge the funeral expenses, because they are payable first; consequently, if there was less than the amount of them, there could not be sufficient to discharge the debts and legacies. The declaration then goes on to state, that in consideration of there being fully sufficient assets as aforesaid, the defendant undertook and promised to pay the plaintiff his legacy. No doubt, then, but at any time after an executor has assented, the property vests; and if it be a pecuniary legacy, an action will lie for the recovery of it." . . . "In the present case there is not only an assent to the legacy, but an actual promise, undertaking to pay it, and that promise founded on a good consideration in law."

The next case is *Hawkes v. Saunders* (a). The action was brought against the defendant in her own right, and the declaration stated that George Saunders by his will bequeathed a legacy of £50 to the plaintiff; that he appointed the defendant his executrix; that she proved the will; that goods and chattels came to her hands, more than sufficient to pay all the testator's debts and legacies, by reason whereof she became liable to pay the legacy, and being so liable, in consideration thereof she promised to pay it. Lord Mansfield said:—"Two objections have been made; first, that there can be no judgment in this case *de bonis testatoris*; because the action is

(a) Cowp. 289.

not brought against the defendant as executrix *eo nomine*; but is a personal demand against her generally in her own right. As to that, we are of opinion the objection is good; for the demand is certainly a personal demand against the defendant, in consequence of a promise made by her, she being executrix. It is admitted at the Bar, that after verdict it must be taken to have been a promise in writing, and that there were assets. If so, the whole case is reduced to this single point, whether the circumstance of the defendant having assets sufficient to pay all the debts and legacies, is or is not a sufficient consideration for her to make a promise to pay the legacy in question?" Lord Mansfield then proceeds to consider the question whether the duty of an executor who has assets to pay a legacy is a sufficient consideration, and proceeds:—"In such a case, a promise to pay stands upon the strongest consideration. Let us see, then, what are the facts of the present case. The testatrix knows the state of her testator's affairs, and of his property; it might consist of chattels which she might not choose to dispose of; it might consist of leases which she had no mind to sell; and having a full fund to pay the demand, which the plaintiff had a right to recover if he pleased, she, in consideration of that fund, promises to pay: I cannot think that this is not a sufficient consideration. I am of opinion it is amply sufficient. It is not like the case of *Rann v. Hughes*; for there, there were no assets, nor any averment of assets stated in the declaration. But in this case there was a full fund; and therefore she was bound in law, justice and conscience, to pay the plaintiff his legacy." Mr. Justice Buller, in a learned and elaborate judgment, considers the question whether the consideration was sufficient, and refers to several authorities, and amongst others, to the case of *Keech v. Kennegal* (a), where he says, "Lord Hardwicke expressly holds, that assets coming to an executor's hands is a sufficient consideration to support a promise; and he puts that case upon the same footing as a promise in consideration of forbearance. His Lordship says:—'At law, if an executor promises to pay a debt of his testator's, a consideration must be alleged, as of assets come to his hands, or of forbearance;

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or if admission of assets is implied by the promise ; otherwise it will be *nudum pactum*, and not personally binding on the executor.' In *Trevinian v. Howel* (a) it was adjudged that having assets is a good consideration for a promise, and the judgment, which was *de bonis propriis*, was affirmed."

The plaint in this case is differently framed ; and I am of opinion, as I have already stated, that the judgment to be entered upon it would be a judgment *de bonis testatoris*. But I am considering the case before the Court, on the assumption, at present, that the proper judgment would be a judgment *de bonis propriis*.

I have next to consider what defence could be set up in this case, assuming that the judgment on the plaint, as framed, would be a judgment *de bonis propriis*. Upon the authorities which I have referred to, and on the assumption I have stated, three pleas might be put in :—first, a plea, putting in issue that the defendant had not assets to pay the legacy, or any part thereof ; secondly, a traverse of the promise, which on the plaint is to be taken to be an express promise ; thirdly, the Statute of Frauds. If any one of these defences was established, the defendant would be entitled to judgment. The reason is plain. The cases referred to establish that the existence of assets, without an express promise, will not entitle the plaintiff to recover, nor will the existence of an express promise, without assets or some other consideration. Therefore, if either the averment of assets, or the averment of the express promise, is traversed and negatived by the defendant, he is entitled to judgment. It is equally plain, that a plea of the Statute of Frauds would be a good plea. I am still assuming, for the sake of argument, that the judgment in this case would be *de bonis propriis*. Now the rule of the Court, as established by the authorities which I referred to, in *Belmore v. Belmore* and *Powell v. Powell*, is that the Court will grant an injunction in all cases where the judgment would be *de bonis testatoris* ; and where the judgment would be *de bonis propriis*, the Court will grant an injunction to restrain the plaintiff at law from interfering with the assets, but will not restrain him from proceeding against the executor personally.

(a) Cro. Eliz. 91.

The present case, however, differs from any already decided. It is to be kept in mind, that I am at present assuming that judgment *de bonis propriis* might be entered on the plaint as framed. The plaintiff could not, on such assumption, recover, except on proof that the defendant had received assets sufficient to pay his legacy, or a proportional part; if such averment were traversed, the defendant would not be bound to traverse the alleged admission of assets, an admission creating no estoppel. If the defendant's pleas were properly framed, the plaintiff at law should prove that the defendant had received assets sufficient to pay the legacy, or a portion thereof, and that he expressly promised to pay it; and that the promise was in writing, as required by the Statute of Frauds. There is no pretence in this case that there was a promise in writing; and the plaint is framed to see how far the Statute of Frauds, and the jurisdiction of a Court of Equity, may be got rid of by clever pleading. The Court of Chancery has by its decree, under which the plaintiff at law has proved, taken upon itself to ascertain and decide on the question of assets; and the plaintiff at law seeks to have that question reinvestigated at law—as without proof of assets, it is clear, on the authorities I have referred to, he cannot recover. The right of the plaintiff at law to judgment is based on the ascertainment of assets; and this Court, having taken upon itself to investigate that question, and the Master having investigated it and made his report, am I, by refusing the injunction, to permit the question to be reinvestigated by a jury?

The case of *Mockler v. Reed* (a) is an authority on that question. It is a well settled rule in equity, that a party is not to be allowed to proceed at law and in equity for the same object and purpose; and if he has elected to proceed in equity, he cannot afterwards proceed at law. In that case, Lord Mansfield said:—"It is the rule of this Court, that after an answer has been put in, and the plaintiff proceeds at law, the defendant may then require him to elect in which Court he will sue; but I never heard that, after a decree had been pronounced, whereby the subject of the cause has been attached in this Court, the plaintiff has

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been permitted to proceed at law for the same matter, particularly without making any application to the Court. After the plaintiff has obtained a decree to account, he is not at liberty to dismiss the bill. Having got the relief he prayed, his election is made, and he cannot proceed at law."

In this case there has been a decree to account; the Master has made his report; and it is now sought by this action, which is only sustainable on proof of assets, to withdraw from the Court a subject matter on which it has already decided. On that ground, I think I ought to grant an injunction. The plaintiff at law is a party in the suit in this Court. He is a party to all the proceedings, and, by proving his legacy under the decree, has become a *quasi* plaintiff; he has elected the tribunal by which the assets are to be ascertained. This case is a novel one; but I am of opinion that even though the judgment to be entered on the plaint should be a judgment *de bonis propriis*, I am justified in granting the injunction.

Another matter was adverted to on the motion, viz., the account which was furnished by Mr. Molyneux. I am not satisfied that Overend would not be entitled to a reference in respect of the assets. The matter stands thus:—Overend has satisfied a jury, that the testator, who was deaf and dumb, gave him the sum for which the action was brought, as a *donatio mortis causa*; and he has got a verdict in that action. The effect of the verdict is, that he is not to be debited with the sum for which the action was brought, nor can he, I apprehend, be debited with any part of the costs of the action. As against a third party, the action having been brought *bona fide* for the purpose of releasing the assets, the executor would be entitled to charge the costs of it in his account. But it would be difficult, I think, to contend that he is entitled to diminish the assets, as against the party against whom the action was brought, and who has succeeded in it. Therefore, in ascertaining the amount of the assets, as against Overend, I think the costs ought not to be taken into calculation; and if I was to make a reference to the Master to ascertain the amount of the assets, Mr. Molyneux would probably have to pay the costs of it, if he were to claim credits to which he is not entitled.

I have come to the conclusion, for the reasons I have stated, that I ought to grant the injunction, and I shall make Overend pay the costs of the motion, because he has framed his plaint in so ambiguous a manner that it is uncertain whether the judgment on it should be *de bonis propriis*, or *de bonis testatoris*; and the course which he has thus thought fit to adopt would have been calculated very much to embarrass the defendant if he pleaded the Statute of Frauds: but if a proper application shall be made, I might probably be bound to make a reference to the Master, in relation to the assets. However, that question is not now before me; all that I at present decide is, that I should grant an injunction to restrain the proceedings at law.

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A father, having a power of appointment over property, consisting of money and land, in favour of his two children A and B, by deed poll, reciting—that £1000 had been paid to A, as a marriage portion out of the trust fund, and that it was intended as her share of the trust fund, and a satisfaction of her claim thereon, appointed and declared that the said sum of £1000, part of said trust fund, should be the full share of A; and he appointed the remainder of the property to B. By a deed, executed five days afterwards, reciting a mortgage by the father, of property not the subject of the power, to secure a portion of the trust fund lent to him; and that the father was indebted in another sum of £200, and that he had agreed to convey his equity of redemption, in consideration of B, the son, securing an annuity to his mother, and charging the equity of redemption with the debt of £200: the father conveyed the equity of redemption to B, and B charged it, and the trust property which had been appointed to him, with an annuity for his mother, and with the debt of £200.—*Held*, in the absence of evidence of the value of the equity of redemption, that the appointment could not be impeached by A, as against a purchaser without notice from B.

RICHARD PAUL TYRRELL HORNER, in the year 1786, was possessed of certain houses on Bachelor's-walk, in the city of Dublin, and of certain houses and lands in Finglas, for terms of years. By indenture, bearing date the 5th of June 1786, being the settlement executed on the marriage of R. P. T. Horner and Elizabeth Nugent, after reciting that the said Elizabeth Nugent was entitled to a fortune of £1000, of the then Irish currency, secured by the bond of her father, George Lucas Nugent; and that R. P. T. Horner was possessed of said houses, and that certain persons, named in a schedule to the deed, were indebted to him in £3000, and had executed bonds to the trustees of the deed, R. P. T. Horner assigned to the said trustees the houses on Bachelor's-walk, and the houses and premises at Finglas, for the residue of the terms for which they were held, with all benefit of renewal; and it was declared that the said leasehold interests, and the other funds, amounting altogether to £4000, were vested in said trustees, upon trust, that the rents of the leasehold interests, and the interest of the debts and securities, should, during the joint lives of R. P. T. Horner and Elizabeth Nugent, be paid to R. P. T. Horner and his assigns, to his and their own use; and from and after the death of the said R. P. T. Horner, in case the said Elizabeth Nugent should survive him, then that the said Elizabeth should receive out of the readiest rents and interest of the said securities, to her own use, £120 yearly, for her life, which was to be

augmented to £170 a-year in case of no issue of said marriage, and that all the remaining rents, issues, interest and produce of said tenements, money, estate and effects, after payment of said jointure, and also the whole thereof, after the death of said Richard and said Elizabeth, should, in case of there being issue of said intended marriage two or more children, go to and amongst them in such shares and proportions, and at such ages, and subject to such limitations and provisoes as the said R. P. T. Horner should by deed or will, to be attested by two or more credible subscribing witnesses, direct and appoint; and for default of such appointment by the said R. P. T. Horner, then to be paid in such shares and at such ages, and subject to such provisoes and limitations as said Elizabeth should by like deed or will appoint; and for default of such appointment, to go to and amongst such issue in equal shares at their respective ages of twenty-one years, or days of marriage, with benefit of survivorship in case of their or any of their deaths. The marriage took place, and there was issue thereof two children, Anne Horner and the Rev. Richard Nugent Horner.

The lands at Finglas were held under a lease from the Archbishop of Dublin to Reilly Towers, for twenty-one years, with the usual *toties quoties* covenant for renewal. Reilly Towers subdemised them on the 4th of May 1785, to R. P. T. Horner, with a covenant for renewal as often as he should obtain a renewal from the Archbishop. The lease was not renewed, and on the 26th of March 1807, the Archbishop of Dublin demised to R. P. T. Horner the lands demised by the lease of the 4th of May 1785, and comprised in the articles of the 5th of June 1786, together with other lands at Finglas, in consideration of a sum of £1000.

Anne Horner married Francis Mills on the 7th of February 1815, and on the occasion of the marriage a settlement was executed, whereby the fortune of Anne Horner, which consisted of a sum of £1500 (secured by the joint bond for £1000, of the said R. P. T. Horner and Richard Nugent Horner, payable in three years, with interest thereon, and a bond of R. P. T. Horner for £500, payable within twelve months after his decease), and a sum of £2000, part of the personal property of Samuel Horner, a lunatic, was vested in

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trustees. The £1000 bond was paid off, and £140 of the £500 bond, leaving a balance of £360 due.

By a deed poll, bearing date the 22nd of March 1822, under the hand and seal of R. P. T. Horner, reciting, among other things, the marriage articles of the 5th of June 1786, and the aforesaid indenture of settlement of the 7th of February 1815, and that £1000, part of the said marriage portion of £3500, was raised by the joint bond of R. P. T. Horner and R. N. Horner, and that same had been since paid off and discharged, with the sum of £1000, part of the trust fund of £4000 comprised in the articles of the 5th of June 1786, and stated to have been advanced for that purpose by William Gorman, as surviving trustee of the said articles; and further reciting that it was intended by R. P. T. Horner that the said sum of £1000, so paid in discharge of the said bond as aforesaid, should be accounted as the share to be appointed to Anne Mills, of the trust fund created and secured by the articles of the 5th of June 1786, and should be considered in full satisfaction of all her claim, under said articles, on said trust fund: it was witnessed that in pursuance and exercise and execution of the power and authority to the said R. P. T. Horner, for that purpose given by the said articles, and of all other powers enabling him thereunto, the said R. P. T. Horner did thereby appoint and declare that the said sum of £1000, part of said trust fund provided by the said marriage articles, and paid by the said R. P. T. Horner in discharge of the aforesaid joint bond of himself and the said R. N. Horner, was meant and intended to be, and should be accounted, deemed and taken to be, in full satisfaction of all claims or demands which Anne Mills, or her said husband, in her right, could or might have, or be entitled to, on foot of said marriage articles, by virtue of any appointment thereunder, or otherwise howsoever: and it was further witnessed that the said R. P. T. Horner, in further pursuance and execution of the said power and authority, did thereby appoint and declare that the several lands and premises comprised in the said marriage articles of the 5th of June 1786, and all the residue and remainder of the said trust funds and moneys, or the securities and purchases made thereunder, remaining after the pay-

ment so as aforesaid made thereof of the principal sum of £1000, to the trustees of the marriage settlement of Anne Mills, and all other the outstanding trust funds and property in said marriage articles mentioned, should, from and after the decease of the said R. P. T. Horner, go and be assigned to and remain the absolute property of the said R. N. Horner, his executors, administrators and assigns, as and for his and their own goods and chattels, subject only to the payment of the jointure provided for the said Elizabeth Horner by the said marriage articles, and to the payment of the yearly rents and performance of the covenants in the several leases, under which the said lands and premises were respectively held.

By deed bearing date the 11th of March 1822, and made between the said R. P. T. Horner of the one part, and William Gorman, the surviving trustee of the articles of the 5th of June 1786, of the other part, and reciting that R. P. T. Horner had, by deed of the 29th of May 1809, mortgaged certain lands in Finglas, to which he was entitled, to secure to William Gorman the repayment of £800, part of the trust fund, included in the said articles, and also reciting that R. P. T. Horner, having borrowed the further sum of £1000, further part of said trust fund, had agreed to grant the said lands of Finglas and his equity of redemption therein to the said William Gorman, to secure the said further sum of £1000: R. P. T. Horner, in consideration thereof, conveyed the said lands of Finglas, and all his estate and interest therein, to the said William Gorman, for the residue of the term for which the lands were held, upon the trusts and subject to the powers declared in said marriage settlement of and concerning the trust funds therein particularly mentioned, subject to redemption on payment of the two principal sums of £800 and £1000, with interest thereon at the rate therein specified.

By deed bearing date the 27th of March 1822, and made between R. P. T. Horner and Elizabeth his wife, of the one part, and the Rev. R. N. Horner of the other part, reciting the lease of the 26th of March 1807, and the two indentures of mortgage of the 29th of May 1809, and the 11th of March 1822, and that under and by virtue of the deed poll of the 22nd of March 1822, R. N. Horner would, upon the death of R. P. T. Horner, become entitled to the

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said two principal sums of £800 and £1000, and the premises on Bachelor's-walk and certain premises in Suffolk-street (which had been purchased with £1200, portion of the trust fund); and reciting further, that the said R. P. T. Horner then stood indebted by bond in the sum of £200, and that he had agreed to convey all his estate and equity of redemption in the premises at Finglas, in consideration of R. N. Horner securing to his mother, the said Elizabeth Horner, an annuity of £102 for her life, as an increase or augmentation of the £120 secured to her by the articles of the 5th of June 1786, and also charging the lands of Finglas with the said bond debt of £200: it was witnessed that R. P. T. Horner granted and assigned the premises at Finglas, and all his estate therein, subject to the said mortgages for £800 and £1000, and also to the payment of the bond debt of £200, to hold to the said R. N. Horner, his executors, administrators and assigns, from the death of the said R. P. T. Horner, for the residue of the term of years granted by the leases or any renewal thereof, discharged from all right and equity of redemption, &c.: and it was further witnessed that R. N. Horner, in pursuance of the aforesaid agreement, and also in consideration of five shillings, appointed, charged and incumbered all the said lands and premises at Finglas, the premises on Bachelor's-walk, and the house and premises in Suffolk-street, and also the said recited mortgages and securities, with the further and additional jointure of £102, to be issuing and payable out of the same, and the rents, issues and produce thereof, to the said Elizabeth Horner, during her natural life, in case she should survive her husband, the said R. P. T. Horner, payable on the 1st of May and 1st of November, in addition to the jointure provided for the said Elizabeth Horner by the said marriage settlement: and it was further provided that the said R. P. T. Horner should receive during his life the rents, interest and produce of the said lands, tenements, principal sums, securities and premises, and should have power to make leases of the said lands and premises, under the conditions therein specified, and should pay the annual interest of the bond debt of £200; and the deed contained a covenant by R. N. Horner to pay the annuity of £102, and a covenant by R. P. T. Horner and R. N. Horner mutually, for further assurance.

On the 29th of August 1825, R. N. Horner mortgaged all his estate and interest in the premises at Bachelor's-walk, at Finglas, and Suffolk-street, for £1500, to Thomas Gisborne Knox and Edmund Francis Knox, and on the 20th of April 1832, he executed a further mortgage to the same parties for £1000.

Thomas Gisborne Knox and Edmund Francis Knox filed a bill for the purpose of raising the amount due to them on foot of the aforesaid mortgages. By a decree of the 19th of July 1848, the lease of the 26th of March 1807, and all the subsequent renewals thereof, were declared to be deemed, as to so much of the premises comprised therein as were comprised in the articles of the 5th of June 1786, a graft, and subject to the trusts of the said articles; and it was ordered that it should be referred to the Master to take an account of the trust funds and estates comprised in the said articles of the 5th of June 1786, and of the manner in which the same had been, and how then, invested, and also to inquire and report whether any and what portion of the said trust funds came to the hands of the trustees of the marriage settlement of the 7th of February 1815, of Francis and Anne Mills, and under what circumstances; and also an account of the property appointed to the defendant, Richard N. Horner, by the deed poll of the 22nd of March 1822, without prejudice, however, to the rights of Anne Mills, if so advised, to file a cross bill to impeach the said appointment.

The Master, by his report, bearing date the 16th of September 1851, found the trust property comprised in the articles of the 5th of June 1786, and that he was unable to state whether any portion of the said trust funds had come to the hands of the trustees of the marriage settlement of the 7th of February 1815, no evidence thereof having been laid before him; and he found that R. P. T. Horner did, by the deed poll of the 22nd of March 1822, appoint to R. N. Horner all the trust premises, save the said sum of £1000, in the said deed poll stated to have been applied in payment of the said joint bond for £1000, of the said R. P. T. Horner, and R. N. Horner. Exceptions were taken to the report by the plaintiffs, to the effect that the Master ought to have reported that the said joint bond for £1000 was paid and discharged out of the trust fund comprised in the marriage articles of the 5th of June 1786.

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Anne Mills, who had survived her husband Francis Mills, filed a cross cause petition on the 22nd of February 1852. The petition stated the foregoing facts, and that it was untrue that the sum of £1000 of the trust funds was applied in discharge of the £1000 bond, and expressly charged the fact to be that no portion of the trust funds ever came to the hands of the petitioner, or her late husband, or the trustees of the settlement of the 7th of February 1815. It submitted to the judgment of the Court, and insisted that, having regard to the circumstances under which the said deed poll was executed, it could not be regarded as an execution of the power of appointment in the articles of the 5th of June 1786, and that the power of appointment had never in fact been exercised; and that consequently, on the death of R. P. T. Horner, the petitioner, under the provisions of the said articles, became entitled to one moiety of the trust funds and premises comprised therein: that even supposing that the deed poll did amount in equity to an appointment in favour of the petitioner, of the sum of £1000, she had never been paid same, or any part thereof, and submitted that she was entitled to be paid same out of the trust funds, with interest from the death of R. P. T. Horner, which occurred on the 25th of May 1845.

The petition was amended. The amendment stated the deeds of the 11th of March 1822, and 27th of March 1822, and submitted to the Court that the said deeds must be taken together, and considered as forming one transaction; and that, having regard to the last-mentioned deed and the provisions thereof, and the circumstance of its having been executed within five days after the execution of the deed poll of the 27th of March, it was pregnant with evidence to show the existence of an agreement between R. P. T. Horner and R. N. Horner, that the former should execute the deed poll or alleged deed of appointment, and the latter should, in consideration thereof, execute the deed of the 27th of March 1822, or some such instrument, thereby relieving his father from the payment of the bond debt, and granting an increased annuity to the said Elizabeth Horner; and the amendment charged that some such arrangement did exist between the father and son; and that the former, by such

alleged appointment, did, through the instrumentality of the power, seek to derive a material benefit to himself, and to relieve his estate from payment of the aforesaid bond debt.

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The original and amended petitions prayed that the rights of the petitioner, under the articles of the 5th of June 1786, might be ascertained, and that it might be declared that the deed poll of the 22nd of March 1822 did not operate as an execution of the power contained in the said marriage articles, and that all the trust funds went, as in default of appointment, in equal shares between the petitioner and R. N. Horner; but in case the Court should be of opinion that in form the power had been exercised under the circumstances aforesaid, such appointment ought to be declared to be fraudulent and void as against the petitioner; or in case the Court should be of opinion that the said deed poll did operate in equity as a good execution of the said power of appointment, the petitioner should be declared entitled to £1000 as her share of the trust funds.

The respondent Thomas G. Knox, who claimed the interest of the plaintiffs in the original cause, by his answering affidavit, submitted that any just demand which the petitioner might have had to the trust funds had been satisfied in the manner recited in the deed of appointment; that the matters in the amended petition contained did not entitle the petitioner to the relief which she sought, and did not afford sufficient evidence of the agreement alleged to have been entered into between R. P. T. Horner and R. N. Horner, with reference to the deed of appointment; that he was wholly ignorant of such agreement at the time, and previously to the execution of the said deeds of the 29th of August 1825, and 20th of April 1832, or at, or previously to, the advances to the said R. N. Horner, or either of them, and that his right should be deemed that of a purchaser for valuable consideration, without notice.

No evidence was given on the part of the petitioner, and the cause was now heard on the exceptions to the Master's report in the original cause and on the cross cause petition and answering affidavit.

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*Argument.*

Mr. *F. Fitzgerald*, Mr. *Deasy* and Mr. *Drury*, for the petitioner Anne Mills.

Mr. *Brewster* and Mr. *Martley*, for the respondents.

The following cases were cited: *Jackson v. Jackson* (a); *Askham v. Barker* (b); *Langston v. Blackmore* (c); *Greene v. Pulsford* (d); *Plunkett v. Lewis* (e); *Douglas v. Willes* (f); *Thompson v. Simpson* (g); *M<sup>c</sup>Queen v. Farquhar* (h); *Hamilton v. Kirwan* (i); *Palmer v. Wheeler* (k); *Connolly v. M<sup>c</sup>Dermot* (l); *Daubeny v. Cockburn* (m).

The LORD CHANCELLOR.\*

*Judgment.*

In the cause of *Knox v. Horner*, a decree was pronounced on the 19th of July 1848, to take an account of the moneys due on two mortgages executed in the years 1825 and 1832, by Richard Nugent Horner, for £1500 and £1000. These mortgages were made for valuable consideration. The premises were certain lands at Finglas, held under the see of Dublin, a house on Bachelor's-walk, and a house in Suffolk-street. The decree directed an account of the trust funds in certain articles of the year 1786, and an inquiry whether any part of them had come to the hands of the trustees of the settlement executed on the marriage of the defendant Anne Mills, and an account of the particulars appointed to Richard Nugent Horner by the deed of the 22nd of March 1822; and the decree was to be without prejudice to the right of Anne Mills to file a cross bill to impeach the appointment made by this deed. The petitioner Anne Mills accordingly filed her petition to impeach the appointment made to his son Richard N. Horner by Richard Paul Tyrrell Horner, under the power

(a) 7 Cl. & Fin. 997.

(b) 12 Beav. 499.

(c) Amb. 289.

(d) 2 Beav. 70.

(e) 3 Hare, 316.

(f) 7 Hare, 318.

(g) 1 Dr. & War. 459.

(h) 11 Ves. 467.

(i) 2 Jon. & Lat. 393; S. C., 8 Ir. Eq. Rep. 278.

(k) 2 Ball & Beat. 30.

(l) Beat. 601.

(m) 1 Mer. 643.

\* The Right Hon. F. BLACKBURNE.

contained in the deed of 1786. That power was to appoint the trust fund, which consisted of a sum of £4000, the house on Bachelor's-walk, and an interest, then of inconsiderable value, in Finglas, to the children of the marriage. This fund had become vested in William Gorman, the surviving trustee of it. He had, in 1809, lent £800, and in 1822 £1000 of this fund to R. P. T. Horner, on mortgages of said premises in Finglas, in which R. P. T. Horner had in 1807 acquired an enlarged and valuable estate, and he had invested £1200 in buying the interest in the house in Suffolk-street. A portion of the trust fund, as I have said, consisted of an interest in a small part of the premises in Finglas, of which the father, R. P. T. Horner, had acquired a lease from the Archbishop of Dublin, which included additional lands, of much greater value. R. P. T. Horner had issue two children, Richard Nugent and Anne, who married Francis Mills in the year 1815. Anne Mills, who survived her husband, by her cross petition has impeached the appointment made to her brother by their father, R. T. P. Horner, as a fraud on the power.

That this appointment did not give more to Richard Nugent Horner than his father had a right to appoint to him, is quite manifest. There was £1000, if not more, of the trust fund, which he either did not appoint, or had actually appointed to Anne Mills. The objection to it is rested on another and different ground; that is, that the father, R. P. T. Horner, took a benefit from the execution of the power, and stipulated and obtained for his wife, not an object of the power, an annuity for her life.

It is too well settled to admit of argument, that a party entrusted with such a power as this could not execute it so as to derive a benefit to himself, or for any other person not an object of the power. It is also to be conceded, that a purchaser, with notice that the estate he purchases has been acquired by an exercise of the power, rendered fraudulent by a contract for and acquisition of such a benefit, cannot maintain a title to the estate against the right of the party defrauded. But I apprehend that, to sustain the impeachment of his title, the facts constituting that impeachment must be alleged and proved.

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The plaintiff accordingly alleges that this impeachment is sustained by the deed of the 27th of March, executed immediately after the appointment made by that of the 22nd of March. This raises the simple question, does the deed show and prove that the donee of the power has derived for himself a benefit from the execution of the power—or in reference to the facts of this case, has R. P. T. Horner given nothing for what he has got? It is plain he has given something; he has given to his son the equity of redemption in the Finglas lands; it is not asserted to have been of no value. If, in fact, it was of no value, or of a value so inconsiderable as, when compared with the stipulated benefits for himself and his wife, to be inadequate and illusory, surely the inadequacy should have been alleged and proved. In the absence of any proof, or even allegation to this effect, we find that the contingent provision made for the wife of R. P. T. Horner, and the £200 provided for by him, are, by the act of the donor and donee of the power, charged on a fund constituted of the separate properties of each; and it is impossible, therefore, to treat them as benefits derived solely, or even in part, from the execution of the power.

I have no reason to doubt, nor is there in the deed any ground on which a purchaser could reasonably have doubted, the fairness of the transaction. If the father, of his own means, gave to the son what was an equivalent for any benefit he received, the transaction is beyond the reach of impeachment. Now I cannot collect from the deed that he did not; and I cannot conceive a more dangerous mode of dealing with the rights of a purchaser than that of first presuming that the value of the property given to the son was an inadequate consideration for what he gave his father, and then visiting the purchaser with constructive notice of the fact so presumed, when up to this moment its inadequacy is neither alleged nor proved. If I did so, I am sure my decision would be wholly inconsistent with the principles laid down by Lord Eldon in *M'Queen v. Farquhar* (a), and by Lord Langdale, in *Green v. Pulsford* (b).

I now come to the exceptions in the original cause. On Mrs.

(a) 11 Ves. 467.

(b) 2 Beav. 70.

Mills's marriage in 1815, her father and brother executed a bond for £1000, to the trustees of the settlement, and this sum is found to have been afterwards paid to the trustees; but the Master reports that he cannot state from what funds R. P. T. Horner, who paid it, procured the said sum, no sufficient evidence thereof having been laid before him. The plaintiff has excepted to this, insisting that the £1000 was part of the trust fund created by the deed of 1786. The object of the controversy on this subject has been, on the part of the plaintiff, to show that £1000, part of the fund, was appointed to Mrs. Mills, and was paid: on her part, to show that there was neither an appointment of this sum nor payment of it out of the trust fund.

There is no doubt that when the original cause was at hearing, and the facts not so fully before the Court, these inquiries were deemed to be material. In my opinion, as the facts are before me, they are utterly immaterial. The bill is filed to raise two mortgages of that part of the property appointed to Richard Nugent Horner by the execution of the power contained in the articles of 1786. If this appointment is valid, Anne Mills' right is to the residue of the fund, for it is quite a mistake to suppose that the property appointed to Richard N. Horner, by the deed of the 22nd of March 1822, was to be liable to pay the £1000. Whether that sum was appointed or not, Richard N. Horner took under that deed, without any obligation to pay it. But view this part of the case in any aspect in which it can be placed, the utter immateriality of the inquiry and exceptions is palpable:—first, if the effect of the transactions that are involved in such obscurity be, that the £1000 was appointed and paid, Mrs. Mills has no cause of complaint or suit against any one. If it be unappointed and never has been paid, she must sue the trustee for her share of it as unappointed: but Knox the mortgagee has no right or interest in the question or the fund. So again, if in fact there was no appointment of the £1000, but the trust fund has been applied improperly to pay the debt of the father and son, she has her remedy, but the mortgagee has nothing to do with that. So put the

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facts in any imaginable view, they never can involve or concern the mortgagee's title to the part of the trust property well appointed to the son. I therefore say, no rule on the exceptions, as the same are immaterial in reference to the subject matter of this suit.

### SMITH v. LORD DUNGANNON.

Nov. 8, 9, 16,  
26.

A testator devised certain lands of Q., in trust, as soon as conveniently might be after his decease, to sell and dispose of the said lands, and that the money arising from the sale, together with the rents and profits of the said lands, until the same should be sold, should be considered as part of his personal estate, and should be applied and disposed of in the same manner as his personal estate. He gave his personal estate to trustees, upon trust, to pay his funeral debts and certain legacies, and, in the next place, that the yearly amount of his personal estate thereby directed to be laid out in the purchase of lands, and the yearly rents and profits of the lands which should be purchased with such personal estate, or any part thereof, should be applied for the payment of his debts and legacies, until the same should be paid off and satisfied. And as to the residue of his personal estate, upon trust, to lay out the same in purchasing lands of inheritance in fee-simple, to be conveyed and assured to his grandson A. T. and his heirs, subject to a charge for renewing certain chattel leases, and he directed a term for years to be created of such purchased lands for that purpose: and upon trust, that until a proper purchase could be had, the trust-money should be laid out at interest, and be applied towards discharging the purchase; and he directed his trustees to renew his chattel leases, which he bequeathed to A. T. for life. The testator died in 1771, and from that to 1837, A. T. continued in possession of the lands of Q. and the chattel leases. From 1820 to 1837 he paid large sums for renewal fines.

ARTHUR, first Viscount Dungannon, made his will, bearing date the 19th of June 1770—the parts of which, material to the question before the Court, were the following:—

“ I give and devise all that and those two lots of ground, held in fee-simple from the city of Dublin, situate, lying and being in Queen-street, in the county of the city of Dublin aforesaid, with all the rights, members and appurtenances thereunto belonging, to and to the use of my said wife Anne Viscountess of Dungannon, the Right Hon. Harvey Lord Viscount Mountnorris, John O'Neill, of Shane's Castle, in the county of Antrim, Esq., Richard

*Held*, that the accumulation of the rents of the lands of Q. was to cease at the end of a year from the testator's death, and that the rents from that period to 1820, when the trust to raise the renewal fines arose, belonged to A. T.; but that subsequently to 1820, the rents were to be set off against the renewal fines.

Jackson, of Coleraine, in the county of Londonderry, Esq., the said Edward Brice and Robert Carson, of the city of Dublin, and their heirs, in trust, that they my said trustees, and the survivors or survivor of them, and the heirs of such survivor, do and shall, as soon as conveniently may be after my decease, sell and dispose of the said lots of ground; and it is my will and mind that the money arising from such sale, together with the rents and profits arising out of said lots of ground until the same shall be sold, shall be considered as part of my personal estate, and shall be applied and disposed of by my said wife and the said Harvey Lord Viscount Mountnorris, John O'Neill, Richard Jackson, Edward Brice, Robert Carson, and the survivors or survivor of them, and the heirs of such survivor, in the same manner as my personal estate and the rents and profits of my leasehold interests in the counties of Down and Antrim are hereinafter directed to be applied and disposed of."

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*Statement.*

The testator then bequeathed Island Magee and other leasehold estates in the counties of Down and Antrim to his said trustees, in trust, to pay an annuity of £300 a-year to his wife for her life, and subject thereto to pay certain sums towards the maintenance and education of Arthur Trevor, his grandson, until he should attain the age of twenty-one years:—"And from and after my said grandson shall attain the age of twenty-one years, subject to my debts, the said annuities and my said legacies, in trust, to permit my said grandson Arthur Trevor and his assigns to take the profits for and during the term of his natural life," and after his decease, upon certain trusts not material to the present report.\*

The will then proceeded thus:—"I give and bequeath all my personal estate whatsoever (except my leasehold interests for years, household furniture, plate and jewels) unto [the said trustees] upon trust, that they or the person and persons who shall succeed such of them as may happen to die, do and shall sell and turn into money all such parts thereof as shall not at my death be in ready money or real securities; and out of my personal estate so given and bequeathed to them, in the first place, to discharge all my funeral expenses and all my just debts, including the sum of £2000, which

(a) See *Kerr v. Lord Dungannon* (4 Ir. Eq. Rep. 343.)

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 ———  
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is payable to the said Earl of Mornington, being part of the portion of my said daughter Anne Countess of Mornington, in exoneration of my settled estate charged therewith, and in the next place to pay thereout the sum of £1000 to my said wife; and I will that the yearly amount of my personal estate hereby directed to be laid out in the purchase of lands, and the yearly rents and profits of the lands which shall be purchased with such personal estate, or any part thereof, and also (after payment of the said yearly sum of £300 to my wife, and the yearly sum of £200 hereinafter bequeathed in trust for the use of my said daughter Penelope Prudence) the rents, issues and profits of my said chattel leases, be applied for the payment of my debts and legacies until the same be fully paid off and satisfied; and as to the residue of my personal estate, except as before excepted, upon trust, to lay out the same in purchasing lands of inheritance in fee-simple, to be conveyed and assured to my said grandson Arthur Trevor, his heirs and assigns for ever, subject, nevertheless, to the charge hereinafter laid thereupon for renewing my chattel leases; and for that purpose I direct a term for years to be created of such purchased lands: and upon further trust that, until a proper purchase can be had, it is my will that such trust-money as shall from time to time remain in the hands of the trustees under this my will, shall be laid out at interest upon Government securities, and that the interest arising thereby shall be applied towards discharging of the purchase-money of the lands hereinbefore directed to be purchased. . . . And my will and mind is, that the rents and profits of the lands to be purchased as aforesaid, until the same shall be settled pursuant to this my will, shall go and belong to the person or persons who for the time being would be entitled to the lands hereby directed to be purchased, in case the same were purchased and settled as aforesaid."

"Provided also, and my further will and mind is, that [the said trustees] shall have power from time to time, at his or their discretion, to enter into agreements for acquiring renewals of all or any of my leases for years, or for acquiring any further interest or estate in all or any of the lands, tenements or hereditaments therein respectively comprised, or of or in any part or parts thereof, and

to carry such agreements into execution; and to raise and pay such fines as shall be requisite for acquiring such renewals, or such further interests or estates, out of the money hereinbefore directed to be laid out in purchasing lands of inheritance in fee-simple, in case the same shall not have been theretofore so laid out; otherwise such fines shall be raised and paid out of the rents and profits of the lands so to be purchased, or by sale or mortgage of a competent part thereof; such renewals, and further interests and estates to be taken in the names of [the said trustees], upon such and the like trusts, and the like intents and purposes as are hereinbefore mentioned and directed, concerning my leasehold interests for years."

Arthur, first Viscount Dungannon, died in 1771, and on his death, his grandson Arthur Trevor succeeded to the title. He attained age in 1784, and went into possession of the leasehold estates which had been bequeathed to him for life, and of the Queen-street premises, and continued in possession of them until December 1837, when he died. Until the year 1817, the leases were renewed, and the renewal fines paid by the trustees of the will of the first Lord Dungannon; after that period (from 1820), the leases were renewed, and the renewal fines were paid by the second Lord Dungannon.

The bill in this cause was, filed in 1841, by the personal representatives of two of the next-of-kin of the testator, charging that the limitations of the leasehold premises bequeathed by the will, after the life interest therein given to Arthur Trevor, were void for remoteness, and that the leaseholds became, after the death of Arthur Trevor, distributable amongst the next-of-kin of the testator; and that the plaintiffs, as personal representatives of the testator's two daughters, were entitled to two-thirds thereof, and it prayed relief accordingly. The defendant Lord Dungannon demurred to the bill. The demurrer was overruled by Sir Michael O'Loughlen (a), and the House of Lords, on appeal, affirmed his decision (b). By a decree of this Court, pronounced on the 23rd of February 1849, it was declared that the limitations of the chattel and leasehold interests, and terms for years, mentioned in the will of the first Lord Dungannon, and limited to take effect after the death of the testator's grandson, the second Lord Dungannon, were void; and it was declared

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(a) See 4 Ir. Eq. Rep. 358, n.

(b) 12 Cl. & Fin. 546.

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that all the residue of the said terms of years and leasehold interests remaining unexpired at the death of the second Lord Dungannon, and all renewals thereof, were a portion of the undisposed personal estate of the testator, the first Lord Dungannon, and that the beneficial interest therein became vested in the next-of-kin of the testator, and was distributable as a portion of his personal estate; and that the plaintiffs, as representing Anne Countess of Mornington, and Penelope Prudence Leslie, were entitled to two third parts, and that the defendants, John Earl of Clare, and the Hon. Robert Henry Clive, trustees of Arthur Lord Dungannon, the third and present Lord, were entitled to the remaining one-third; and it was referred to the Master to take an account of all fines, purchase moneys, and all reasonable and fair costs and expenses incurred by the second Lord Dungannon, or by the executors or trustees of his will, or by the present Lord Dungannon, or any trustee for either of them, in obtaining renewals of the said leases.

The Master, by his report, dated the 17th of July 1852, found that £4061. 10s. 9½d. had been paid by the second Lord Dungannon in his lifetime, in obtaining renewals, and deeds of covenant for renewals, of the leasehold interests. That the defendants, John Earl of Clare and the Hon. Robert Henry Clive, as trustees of the will of the second Lord Dungannon, were entitled to compound interest on the sums so paid, from the date of the several payments to the day of the decease of the second Lord Dungannon, which, together with a further sum advanced by the said trustees, and certain costs, amounted to £13,729. 9s. 2d. But he found that the second Lord Dungannon entered into receipt of the rents and fines of the Queen-street premises, and that the defendants, the Earl of Clare and the Hon. R. H. Clive, or the present Lord Dungannon, since the death of the second Lord, had continued in such possession; and that said premises yielded a yearly profit-rent, after payment of the head-rent, of £44. 8s. 11d., and that same, with the several renewal fines and compound interest at the rate of £5 per cent., up to the 24th day of June 1841, the day on which the said defendants, Lord Clare and the Hon. R. H. Clive, paid for the last renewal obtained of the leasehold interest, amounted to the sum of £26,567. 1s. 10d., which

was applicable under the will of the first Lord Dungannon, in obtaining renewals of the leasehold interests; and he found that the rent of £44. 8s. 11d. was the proper fund out of which the fines and other expenses of obtaining renewals of the said leasehold interests ought to have been paid; and inasmuch as said fund was received by the second Lord Dungannon, and his executors since his decease, he found that there was not any sum due or payable to the said executors on account of the fines and other expenses of obtaining said renewals.

The Hon. R. H. Clive, the surviving trustee and executor of the second Lord Dungannon, excepted to the report, that the Master ought to have found, that according to the true construction of the will of the first Lord Dungannon, the said sum of £26,567. 1s. 10d., or any part thereof, was not applicable to the obtaining renewals of the leasehold interests; and that he ought not to have found that the rent of £44. 8s. 11d., or any part thereof, was the proper fund out of which the said fines and other expenses ought to have been paid.

Mr. *Brewster*, Mr. *Martley*, Mr. *Hayes* and Mr. *Barlow*, in support of the exceptions.

They contended that the trust for accumulation of the rents of the Queen-street premises expired at the end of a year from the testator's death. From that period, the second Lord Dungannon was entitled to the rents of the Queen-street premises, if unsold, or to the interest of the purchase-money, if sold, until new lands were purchased, subject to have the renewal fines raised out of the *corpus* of the estate, or the principal of the money, but not out of the rents and profits. Apart from the direction in the will, there was no obligation on him to pay the renewal fines: *Sitwell v. Bernard* (a); *Taylor v. Clark* (b); *Dimes v. Scott* (c); *Vickers v. Scott* (d); *Adderly v. Clavering* (e); *Verney v. Verney* (f); *Nightingale v. Lawson* (g); *Jones v. Jones* (h); *Killington v.*

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- (a) 6 Ves. 520.  
(c) 4 Russ. 195.  
(e) 2 Br. C. C. 658.  
(g) 1 Br. C. C. 440.  
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- (b) 1 Hare, 161.  
(d) 3 M. & K. 500.  
(f) 1 Ves. 428.  
(h) 5 Hare, 440.  
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*Gray (a); Walker v. Shore (b); Gibson v. Bott (c); Noel v. Lord Henley (d); Pearson v. Lane (e); Angerstein v. Martin (f); Stott v. Hollingworth (g); Hewit v. Morris (h).*

*Argument.*

Serjeant *Christian*, Mr. *Francis A. Fitzgerald* and Mr. *Thomas R. Henn*, for the report, argued, that there was an express and continuing trust for payment of the renewal fines out of the Queen-street premises; that the second Lord Dungannon, by going into possession of them, had put himself in the position of a trustee, and was bound to discharge the trust in the most beneficial manner to the *cestuis que trust*, viz., out of the accruing rents of the lands: *Mortimer v. Watts (i); Mountfort v. Cadogan (h).*

THE LORD CHANCELLOR.\*

*Nov. 26.*

This comes before me on exceptions to Master Brooke's report; they arise on the construction and effect of the will of Lord Dungannon, made in the year 1770. The testator had two houses in Queen-street, which he held in fee, and had leasehold estates in the lands called Island Magee, and other lands held under bishops' leases. These leaseholds he limited to Arthur Trevor, the late Lord Dungannon, for life. The claim of his executors for the sums paid by him as tenant for life of the lands of Island Magee, in order to procure renewals of them, has given rise to a counter-claim, amounting in substance to this: that he had previously enjoyed, for above sixty years, the rents of those Queen-street premises, which if accumulated with compound interest would, as the report finds, have greatly exceeded the executors' demand for the renewal fines.

There is no difficulty in ascertaining the testator's intention, to this extent, that he meant to have the leasehold interests extended and renewed; and it is plain that his personal estate, now represented

(a) 2 St. & H. 396.

(b) 19 Ves. 392.

(c) 7 Ves. 89.

(d) Dan. 332.

(e) 17 Ves. 101.

(f) Tur. & Russ. 232.

(g) 1 Mad. 161.

(h) Tur. & Russ. 241.

(i) 14 Beav. 616.

(k) 17 Ves. 485; 19 Ves. 435.

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by the Queen-street estate, was the fund that he provided for that purpose.

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I shall now state the provisions of the will on this subject. He gives his personal estate to trustees, to be converted by them into money, to pay his funeral expenses and debts, and the residue to be laid out in purchasing lands of inheritance, to be conveyed to his grandson, Arthur Trevor, and his heirs for ever, subject to the charge thereafter laid thereupon for renewing his chattel leases. For that purpose, he directs a term for years to be created of the purchased lands, and until a purchase should be had, that the trust money should be laid out at interest on Government security, and the interest arising thereby applied towards the discharge of the purchase-money.

By a previous clause he had devised to the trustees the lots in Queen-street, to sell, as soon as conveniently might be, after his decease; the money arising by the sale, with the rents and profits until sold, to be considered as part of his personal estate. These lots of ground in Queen-street never have been sold; they were enjoyed by Arthur Trevor, afterwards Lord Dungannon, from his grandfather's death in 1771 until the year 1837, when he himself died. The direction to the trustees to obtain renewals of his leasehold lands is contained in a subsequent clause, which directs the trustees to raise and pay such fines as shall be required for obtaining the renewals, out of the money thereinbefore directed to be laid out in the purchase of lands of inheritance, in case the same shall not have been theretofore so laid out; otherwise such fines to be raised and paid out of the rents and profits of the lands so to be purchased, or by a sale or mortgage of a competent part thereof.

The first of the clauses I have mentioned, it is observable, contains an express trust for the accumulation of the residue of the personal estate, until a proper purchase could be had; and a distinct devise of them, when purchased, to the testator's grandson, in fee, subject to a charge to be effectuated by a trust term for raising the fines for renewals, out of the rents and profits, or by a sale or mortgage of a competent part thereof. How then, consistently with the devise in fee to Arthur Trevor, are we to deal with a trust

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for accumulation until lands could be purchased? How long is the accumulation to go on? No time is fixed for the purchase; none may be had for two, or for ten, or for twenty years. Is the enjoyment of the estate by the devisee to be postponed, and postponed indefinitely? These are the questions and difficulties which called for an arbitrary rule, and gave rise to the decision in *Sitwell v. Bernard*, now a governing case of the highest authority, and which, in the very late case of *Macpherson v. Macpherson* (a), in the House of Lords, has been so treated by Lord St. Leonards. There the residue of personal estate was directed to be laid out in lands, to be settled, the interest to accumulate, and be laid out in lands, in like manner as the residue of the personal estate. The lands to be purchased were to be limited to the testator's son in strict settlement. The personal estate was of very large amount, and required a long time to collect and make it available, and the question was, whether the accumulation was to go on from year to year indefinitely, so as to defer any enjoyment of the interest of the fund until it was realised and estates purchased. The present and that case are in their circumstances so similar that every observation made by Lord Eldon, and the rule which he applied and acted on, must decide that before me. That rule was, to stop the accumulation at the end of a year, computed from the testator's death, that being the time at which it is presumed the personal estate may be collected. After speaking of the difficulty of calling in the assets, Lord Eldon says:—"In this view of the case a very considerable question arises in the construction of the will, addressed to the discretion of the Court. The first consideration with reference to that is, how far the Court has in other cases construed instruments somewhat similar in their terms; and in effect how far the Court has assumed such a discretion, as enabling them on the whole to make a useful and wholesome construction of such a will, between particular interests and those entitled to the bulk of the property." Then, commenting on the case of *Hutchinson v. Mornington*, he says:—"That case is a strong authority to show the length the Court will go, on general grounds of convenience, in the construction of a

(a) 16 Jur. 847.

will indicating a purpose which it is almost impossible to execute consistently with the other purpose, that the party in whose behalf it is to be executed shall beneficially enjoy the interest intended by the testator." These words apply most directly to the case before me. If it is clear, on the one hand, that the fund was intended to accumulate until its investment in land, it is clear, on the other, that when purchased, the land was to be conveyed to Arthur Trevor, and beneficially enjoyed by him.

The language of Lord Eldon, in *Angerstein v. Martin* (a), is also very applicable. Lord Eldon stated that "the plaintiff was clearly entitled to the rents of the testator's real estates from the time of his death, and that if the trustees, in the course of the year after the death of the testator, laid out the whole of the personal estate in the purchase of lands, it would be extremely difficult to say that the plaintiff would not be entitled to the rents of the lands from the time of the purchase." His Lordship observed, that the proviso enabling the trustees to lay out the money in the stocks, or upon real security, authorised them to continue it upon existing mortgages; and he then proceeded thus:—"I take the cases of *Sitwell v. Bernard*, *Entwisle v. Markland* (b), and *Stott v. Bruere* (c), not only not to govern this case, but to be directly the converse of it. In all those cases an accumulation was directed, and the intention was, that the intermediate rents and profits, till the purchase was made, should form part of the moneys to be laid out: no person was to take any interest until the trust with respect to the purchase was completed, and those trusts could not be completed till the intermediate profits were laid out. The question was, what was the Court to do, where the testator directed the interest to accumulate, and be laid out with the principal: and the Court held that the direction for the accumulation should only operate for one year; and that although the principal remained as personalty, it should, at the end of the year, be considered as converted, and the beneficial enjoyment should be the same as if the conversion had been made. That decision appears to me to have been right."

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Judgment.

(a) 1 Turn. & Russ. 239.

(b) 6 Ves. 528.

(c) 6 Ves. 529.

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*Judgment.*

According to these decisions, and the language of Lord Eldon, it is my duty so to construe this will as to have due regard and give effect to the particular purpose—that is, the direction for accumulation, and to secure the beneficial enjoyment of the property by Arthur Trevor. This can only, according to the authorities, be done by confining the operation of the clause for accumulation to one year from the testator's death; at the end of that year, I must treat the property as belonging in title and possession to Arthur Trevor, subject, however, to the trust for the payment of the renewal fines, which the testator has directed to be effected by a term for years limited to trustees. Suppose then this Court were called on to have a deed executed for the purpose, it is obvious that it would order the lands purchased by the trustees to be limited to other trustees for a term, in trust, out of the rents and profits, or by sale or mortgage, to raise the sums from time to time required to pay the fines; and in the meantime, and subject thereto, to the use of Arthur Trevor in fee.

If this be, as I think it is, clear, can the report of the Master be right in the principle on which he has acted? That principle is, that the rents of these houses having been actually enjoyed by Arthur Trevor, the late Lord Dungannon, who was tenant for life of the leaseholds, and paid renewal fines, to the amount of £12,000, he was bound to give a countervailing and equal credit for as much, out of a sum composed of the accumulated rents of the Queen-street premises, and compound interest from 1771 to the year 1837. There can be no doubt that his representatives are justly chargeable with those rents and interest, computed from the year 1820, when the first renewal fines were paid; for at and from that time, those fines were a charge on the Queen-street premises, and raiseable out of rents and profits, or by a mortgage or sale of them for a term. This would have been the exact state of the rights of the parties; but I cannot see on what ground it is contended that the by-gone rents, received by Arthur Trevor, as the absolute owner of the estate, could be contended to have been applicable to pay renewal fines not due, demandable or payable. There is no case of default made, by reason of any omission to obtain an extended term of

the Island Magee lease, and regular renewals of the others; on the contrary, this case stood over, to inquire how the matter stands, and it is ascertained that the fines for the bishops' leases were duly paid, and that a lease of Island Magee could not have been obtained sooner than 1820. The principle, therefore, on which this part of the report is made, is at direct variance with the authorities which decide that the accumulation should end, and Arthur Trevor's beneficial enjoyment begin, at the end of a year from the testator's death. If the report be right, the trust for accumulation was to continue for an indefinite time, Arthur Trevor remaining liable, whenever the fines became payable, to account, with compound interest, for all the rents antecedently received by him, as far as required to provide for their payment. This is a view of the case I cannot accede to; it is, as I have said, a contravention of the principle that insured to him the beneficial enjoyment of the estate, and is a state of things which a due execution of the trusts of the will never could have warranted.

The Master must review his report, on the assumption that the year 1820 was the time when this trust should have been executed.

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*Chancery.*  
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DUNGANNON  
*Judgment.*

Let the report be referred back to the Master, and let the said Master rectify his report; and for that purpose declare that Arthur, the second Lord Dungannon, or his trustees, are not to be charged in account with any sum received by them, or on their behalf, as to and for the rents and profits of the Queen-street premises, in the said report mentioned, which accrued due previous to the 31st day of May 1820, when the renewal, bearing date the last mentioned day, and the deed of conveyance, was executed; and refer it to the Master to ascertain the value of the Queen-street premises, on the said 31st day of May 1820, and let him deduct the sum so to be found for such value from the sum then paid for such renewal and deed of conveyance; and let the Master calculate compound interest upon such balance only from that period until the death of the said Lord Dungannon; and let him

*Order.*

1852.  
*Chancery.*  
 SMITH  
 v.  
 DUNGANNON  
 Order.

also, in like manner, calculate compound interest upon the said sums from that period, and also upon the sum of £1392. 6s. 2d., in the said report mentioned to have been paid for the renewal of the 24th of June 1841, from thence up to the making of his report.

*Reg. Lib. Gen. 7, f. 266.*

Nov. 10, 11,  
 15.

### FITZGIBBON v. BLAKE.

The interest due at the time of a fund settled to the separate use of a married woman, with a clause against anticipation, charged with the amount of a promissory note indorsed by her.

But *semble*, interest which accrued due after the date of the promissory note could not be charged with it.

Costs refused when the bill was drawn at unnecessary length.

By a marriage settlement bearing date the 21st of December 1846, and executed on the marriage of Anne Gildea and Xaverius Blake, certain funds, the property of Anne Gildea, were vested in trustees, upon trust to pay the interest, dividends and annual produce to such person or persons as said Anne should from time to time, notwithstanding her coverture, appoint, but not so as to dispose of same by anticipation; and in default of such appointment, into her own hands, for her sole and separate use, independently and exclusively of said Xaverius Blake, and without being in any way subject or liable to his debts, control or engagements; and it was thereby provided that the receipts of said Anne Gildea, after said interest and dividends should become due, and the receipt of no other person, should be good and sufficient discharges for the same.

On the 19th of February 1849, Anne Gildea, otherwise Blake, indorsed a promissory note for £72. 13s., made by James Knox Gildea, one of her trustees, to the plaintiff, Fitzgibbon. At the time of the indorsement there was an arrear of interest due to the defendant, Anne Blake, of £314. The bill was filed against Anne Blake and her trustees, to raise the amount of the promissory note out of her separate estate. The bill was drawn with great prolixity, setting forth interviews and conversations which had nothing to do with the question in the case, which was a simple question of

law, whether the plaintiff was entitled to charge the accruing dividends or the arrears due, with the amount of the promissory note. The defendant, Anne Blake, by her answer set up defences which failed, and which it is not necessary to set forth.

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*Chancery.*  
FITZGIBBON  
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Mr. *Francis A. Fitzgerald* and Mr. *Hardy*, for the plaintiff, cited *Owens v. Dickenson (a)*; *Hulme v. Tennent (b)*; *Murray v. Barlee (c)*.

Mr. *B. C. Lloyd* and Mr. *Reilly*, for Blake and wife, and Mr. *F. W. Walsh*, for Charles O'Hara, one of the trustees, relied on the clause against anticipation: *Brown v. Bamford (d)*; *Bagget v. Meux (e)*; *Harnet v. McDougal (f)*; *Field v. Evans (g)*; *Moore v. Moore (h)*.

The LORD CHANCELLOR.\*

Nov. 15.  
Judgment.

In this case there is no question of doubt or difficulty to be considered or decided. The plaintiff holds a note for £80, indorsed by the defendant, Mrs. Blake, and seeks by this bill to levy its amount out of her separate property, she having, by so indorsing it, given the plaintiff a clear right to have it so paid through the assistance of this Court. The property settled consists of a charge on the estate of Mr. Gildea, and some Government stock. The settlement of it contains a very stringent clause against anticipation. The existence and effect of this do not appear to have been known to either of the parties until a late period of the cause; yet now that they are known, they are wholly immaterial, as far as they regard the payment of the plaintiff's debt, because as there was £314 personally due and payable to Mrs. Blake for the annual arrears of her separate estate, she could dispose of this, and did in fact charge it with the debt of the plaintiff, contracted by her indorse-

(a) 1 Cr. & Ph. 48.

(b) 1 Br. C. C. 16.

(c) 3 M. & K. 209.

(d) 1 Phil. 620.

(e) 1 Coll. 138; S. C. 1 Ph. 167.

(f) 8 Beav. 187.

(g) 15 Sim. 375.

(h) 1 Coll. 54.

\* The Right Hon. F. BLACKBURNE.

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*Chancery.*  
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 ———  
*Judgment.*

ment. Thus the existence of the clause against anticipation becomes a neutral fact, quite immaterial; for it affords no defence to the claim of the plaintiff to be paid out of the arrears. I must therefore declare this debt and the interest of it to be well charged on the arrears due on the separate estate of Mrs. Blake at the time the last renewal of the promissory note took place.

It would have been a matter of course to have directed the costs of this cause to be paid out of the same fund, if this suit had been conducted, on his part, as I think it ought to have been; but when I find the plaintiff insisting on a measure of relief exceeding his right, that his pleadings have been so ruinously and unnecessarily prolix, and that an offer was made, which, whether authorised or not, was a fair one, and if accepted, would probably have given him all he had a right to demand, I cannot consider him entitled to charge the estate of this married woman with the costs of this cause, up to the present hearing. On the other hand, the case of the defendants has been conducted in such a way as to disentitle them to any costs. They have relied on various matters of defence, none of which they have established, and thus have, to some extent, occasioned both expense and delay.

It was not until after Mr. *Fitzgerald's* argument, in favour of the defendants, was concluded, that I was aware there were funds sufficient to pay the plaintiff's debt, without any infringement of the clause against anticipation. I, however, think it right to say that I do not consider a general creditor of a married woman to have a right to be paid, save out of arrears actually due on her separate estate, when his debt was contracted, where the settlement contains a clause against anticipation.

*Order.*

Declare the plaintiff entitled to be paid interest on the charge affecting the estate of J. K. Gildea, out of the arrears of the separate estate of the defendant Anne Blake, the sum of £72. 13s. 0d., with interest at £5 per cent. from the 22nd day of May 1849 until paid, and let the plaintiff be at liberty, if so advised, to apply, in the cause of *Gildea v. Gildea*, to be paid that sum; and let the plaintiff and the defendants Xaverius and Anne his wife abide his and their

own costs of this cause, up to and including the hearing; and let the defendant Charles O'Hara be paid his costs out of the said arrears.

*Reg. Lib. Gen. 7, f. 231.*

1852.  
*Chancery.*  
FITZGIBBON  
v.  
BLAKE.  
Order.

WARING v. WARING.

*Dec. 4.*

THE facts of this case, as they appeared in the petition and the affidavits, filed on behalf of the respondents, were in substance as follow :—

John Waring, on his marriage in 1833, gave a bond for £1500 to Nathaniel John Montgomery and Thomas Waring, the trustees of his marriage settlement, which bore date the 11th of October 1833. The trusts of the settlement, as to that sum, and a similar sum of £1500, the fortune of Geraldine Montgomery, the intended wife, were to permit the £1500, so secured by the bond of John Waring, to remain out on the security of the bond of the said John Waring, until and unless they the said Nathaniel Montgomery and Thomas Waring should mutually consent and agree to call in the same, in which case the moneys so to be received in payment thereof should be invested in the Government funds; and to pay the interest of said two sums of £1500, or permit it to be received by the said John Waring and his assigns, during his life, or until he should become bankrupt or insolvent; and after the decease of the said John Waring, then in trust for Geraldine Montgomery otherwise Waring, for life, and after her decease, if there should be issue of the marriage, in trust for the children, as the said John Waring should appoint, and in default of appointment by him, as the said Geraldine should appoint; and in default of appointment by either of them, then in trust for the issue of the marriage, share and share alike, and if but one child, then to such child; and in default of issue, who, being a son or sons, should attain twenty-one, or being a daugh-

An executor lent a sum of £4100 of his testator's assets, on the security of a property, worth at the time between £60,000 and £70,000, and incumbered to the amount of £27,000. The solicitor for the borrower was also employed for the executor, the lender. No opinion of Counsel was taken on the title, and no searches were made, as it had been done on two occasions within seven years, on other loans. The security having turned out defective in value, the executor was decreed to bring in the money.

Observations on the impropriety of the same solicitor being employed for lender and borrower, in loan transactions.

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ter or daughters, should attain twenty-one, or be married, in trust for the survivor of the said John Waring and Geraldine Waring.

There was issue of the marriage, one daughter, Anne Waring. John Waring died on the 6th of March 1836, having made his will, by which he left all his property to the Rev. Charles Waring and Lucas Waring, upon trust, to convert it into money, and in the first place, to pay the bond debt of £1500, due to the trustees of the settlement, and after payment of said debt, and all other debts due by him, to invest the rest of the produce of his estate and effects in the funds or on real security, upon certain trusts for the benefit of his wife and daughter. Lucas Waring alone proved the will. The £1500 secured by the bond was not paid to the trustees of the settlement. In 1837, Lucas Waring lent a sum of £4100, of the assets, with some money of his own, to Colonel Nuttall Greene, on mortgage of certain lands in the county of Wexford. The loan was carried out by Mr. Leonard Dobbin, who acted on the occasion as solicitor for both borrower and lender. Mr. Dobbin had been long the solicitor for Colonel Greene; and on the occasion of a former loan in 1830, registry searches had been made, and the usual judgment and other searches, and the opinion of Counsel had been obtained on the title. The same had occurred again in 1836, on the occasion of a further loan; but no searches were made in 1837, on the occasion of the loan by Mr. Lucas Waring. The existing incumbrances amounted at the time to £27,000 or £28,000. Both Waring and Dobbin stated in their affidavits that the value of the property was between £60,000 and £70,000, and that the additional loan of £4500 was at the time, in their judgment and opinion, a perfectly safe and eligible investment; and the rentals of the estate were produced to show that it was so. The interest on the mortgage not having been regularly paid, Lucas Waring filed a bill for foreclosure and sale in 1842, and obtained a decree, but, owing to the depreciation of property at the time, the lands were not sold. A petition was presented in 1849 by another creditor, in the Incumbered Estates Court, and the lands were set up for sale in July 1852, when £21,170 was bid for them. The Commissioners considering that sum inadequate, an order was made for a re-sale, although a further offer of £24,500 had been made.

The petition was filed by Anne Waring by her next friend. It charged that Lucas Waring was guilty of great neglect and default, in advancing the money upon the security of a property so heavily incumbered, and that he did not make the due or proper and necessary searches and investigations into the incumbrances then affecting said property, which was then and had been ever since insufficient to secure the payment of the money so lent; and it prayed an account of the estate, real and personal, of John Waring, and that, in the first place, a sum of £1500 might be set apart and paid to the trustees of the settlement, and that the residue of the personal estate might be ascertained and secured for the benefit of the petitioner and her mother, according to the trusts of the will; and in case it should appear that the said Lucas Waring had invested or lent out any part of the assets upon inadequate or insufficient security, or contrary to his duty as executor, that he might replace the same, and bring in and invest it to the credit of the cause.

The respondents named in the prayer of the petition were Lucas Waring, Geraldine Waring, Nathaniel John Montgomery and Thomas Waring. Thomas Waring disclaimed.

The respondent Lucas Waring stated in his answering affidavit that the £1500 secured by the bond of John Waring had been lent to Colonel Greene, with the consent and sanction of Nathaniel J. Montgomery, the acting trustee of the marriage settlement; and in support of the statement the following letter was referred to and produced. It was written in reply to a letter of the 15th of March, in which Lucas Waring informed Montgomery of his intention to lend the money, and of the state of Colonel Greene's property.

“Dublin, Dominick-st., 24th March 1837.

“DEAR LUCAS—I only returned to town from circuit on Tuesday evening last, otherwise you should have heard from me in due course. From what you state of Colonel Greene's property, it would appear an eligible investment for the £1500; but at the same time it would be quite desirable, and I am sure you will satisfy yourself in this respect, that the property has not been further incumbered since you last dealt with it, and that it is ample. The

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 —  
*Statement.*

title, I presume you investigated to your satisfaction on the former occasion, and that you have such deeds, papers and rental in your possession as you then conceived necessary. So far as I am concerned, in my capacity of trustee, having every confidence in you, I have not the slightest objection to allow the sum secured by John's bond for the present to remain unpaid. You had better, however, confer with Thomas on the subject. Although the trustees have the power of keeping down the interest on charges already affecting the estate, it is probable the deed does not extend to any future charges to be created. See to this, and give me a similar power with regard to the £1500.

(Signed) "NATHANIEL MONTGOMERY.

"L. Waring, Esq."

*Argument.* Mr. *Hughes*, Mr. *Fitzgerald* and Mr. *B. C. Lloyd*, for the petitioner.

Mr. *Brewster*, Mr. *Martley* and Mr. *J. F. Walker*, for the respondent, Lucas Waring.

Mr. *Otway* and Mr. *Blackham*, for Nathaniel Montgomery.  
 Serjeant *Christian*, for Thomas Waring.

The LORD CHANCELLOR.\*

*Judgment.* The object of this suit is to enforce payment of a trust fund, amounting to £4100, which was lent on mortgage in the year 1837, by the respondent Lucas Waring, as executor of John Waring, to Colonel Nuttal Greene. This is composed of a sum of £1500, secured by the bond of John Waring, to the trustees of, and for the uses of, the settlement executed on his marriage in 1833, and £2600 the assets of John Waring. The obligees in the bond are the respondents Nathaniel Montgomery and Thomas Waring. The latter has disclaimed, and therefore the sum secured, if not paid or released, is still due to Nathaniel Montgomery.

What may be the result of the acts and acquiescence of Nathaniel Montgomery in respect to this £1500, to which the petitioner, as the sole issue of her father, is entitled, and whether it shall be that of

\* Right Hon. F. BLACKBURN.

exonerating the respondent Lucas Waring, the executor of the obligor, from his liability on the bond, I am not called on to inquire. The proposition, and the only one which I have to consider, is, whether, as against the plaintiff, the sum secured by it has been paid, or has been so invested as to disable her from calling on this Court to aid in its recovery?

As to the position and liability of Nathaniel Montgomery, it is plain that he never has executed the trust on which this bond was given to him; he has not, in fact, called in the money, or invested it, as it was his duty to have done, and as he might have done, for there were abundant assets of the obligor to pay it. If I were to presume that he consented to its investment by Lucas Waring (which the latter, possibly, may be able to prove), it would make no difference as to the plaintiff's right against Nathaniel Montgomery, for he could not possibly defend himself by investing, or consenting to invest, the £1500 otherwise than in Government funds and securities, because on such alone does the settlement authorise its investment.

It has been argued on behalf of Nathaniel Montgomery, that he and his co-trustee were at liberty to leave the money outstanding, secured by the bond of the obligor, and that therefore he has not committed a breach of trust in allowing it to remain in the hands of John's executor. But I cannot, consistently with the facts proved, allow him the benefit of any such defence; first, because the clause in question was rendered inoperative by the disclaimer of Thomas, but mainly because Nathaniel Montgomery is fixed with distinct notice that the fund was invested in a manner not warranted by the settlement, and for fifteen years has never demanded either the principal or interest of the bond, though he ought, *de anno in annum*, to have received the interest and paid it as the settlement directs. If, therefore, the money has been lost by the manner in which he suffered it to be dealt with, he must be answerable, and he has no defence in this Court against the petitioner's claim. His position, in short, is this:—that he had a security, that there was a fund for its payment, and that that fund has been lost—whether by his own neglect or his acquiescence in its improvident disposition, is wholly immaterial.

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The main defence of Lucas Waring is, that the whole fund, consisting of the £4100, the debt of the testator, and the residue of his assets, has been duly invested on the security of the mortgage executed in 1837. Whether this was or not such an investment as to be a due execution of the trust imposed on the respondent as executor of his brother, is the principal question in the case. I have already said that, treating it as an investment of so much of the assets as was equivalent to and represented the sum of £1500, secured by the bond of John Waring, it cannot be justified; because the settlement did not authorise its investment in real security. But treating it, along with the £2600, as a portion of the general assets, which the executor might so have lent and invested, the important question is, has it been lent on real security in a manner that, having regard to the general rights of *cestuis que trust* and the duties of trustees, this Court can sanction and ratify?

That a great or total loss of the fund on which it was invested is probable or certain, forms no ingredient in the opinion which I am obliged to express and act upon. That loss may actually be attributable to a vast variety of causes and events, which, in 1837, no human sagacity could have suspected or foretold. These causes and events I have, therefore, not allowed to enter into the consideration of the question which I feel myself in fairness bound to put thus:—was the investment of the £4100 of the testator's assets in 1837 such, and so conducted, as to be a due execution of the trust to lend them on real security? I am bound to say that it was not; and that it was divested of all, or almost all, the caution and providence which the due execution of the trusts and the obvious interests of the *cestuis que trust* demanded.

In lending or borrowing on landed security, there must be always two leading topics of inquiry—first, the title of the borrower; secondly, the sufficiency of the value of the estate. As to the first, there seems to be no actual cause of complaint against Mr. Lucas Waring; for though he omitted to have it investigated, its validity is not now questioned; it is, however, an omission that shows how loosely the matter was conducted, and suggests the question, important here, but more important in the other branch of the transaction—

could all this loss have happened if, as in the ordinary transaction of a loan, the lender and borrower had different solicitors? On this most important topic, whatever I say is irrespective of the highly respectable gentleman to whom Mr. Lucas Waring had recourse, and by whose professional advice he was governed, in lending the assets of Mr. John Waring to Colonel Greene.

The employment of the same professional person, in the ordinary case of vendor and purchaser, is, from the conflicting nature of the duties which each employer has a right to have performed, for obvious reasons highly objectionable. Practically, and for the most obvious reasons, it is equally, if not more so, for the lender to employ the borrower's solicitor. Though there is not a conflict of rights, there is an opposition of interests, and the solicitor for the borrower must be anxious to remove the very difficulties which it is his duty to discover and suggest. There is, in short, such an inconsistency in the interests of each party, that a common agent of both can hardly do his duty to the one, without betraying or neglecting his duty to the other.

Of this there cannot be imagined a stronger example than the case before me. Putting the consideration of title aside, a solicitor employed by Mr. Lucas Waring would first have had to advise whether trust money could be safely lent on an estate incumbered as this was. Taking it at the utmost value which the rental warranted, he would have inquired was the investment safe and eligible? Now, I have no hesitation in saying, that had Mr. Lucas Waring employed an intelligent man of business, and put before him the rentals of this property, and the statement that it was already charged with incumbrances to the amount of £27,000, he must and would have told him that the investment would be improper and unsafe. I do not mean to lay down the proposition that trustees may not lend money on a puisne security; but I am decidedly of opinion that, where an estate of this value was so incumbered with head rent and interest on prior incumbrances to so large an amount, compared with its rental, it was in the highest degree improvident, and pregnant with the most injurious consequences to the parties beneficially interested, to invest a trust fund in an estate already so exhausted. No prudent

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*Judgment.*

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*Chancery.*  
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man could or would have done such an act; and in holding the trustee responsible, I exact no more care or caution than I think any prudent man might be expected to exercise in similar circumstances. It is impossible, if any experienced solicitor had been consulted, that he would not have foreseen and pointed out the difficulty and embarrassment likely to attend the recovery both of the interest and principal. As to the latter, there could be no remedy at law; and in equity, the remedy could be only worked out by an offer to pay off or redeem the estate from the prior mortgages. Can it be said that a trustee acted as he ought, in placing the fund and its owner in such a state of jeopardy—placing the fund in such a state that it could not be called in, except on a condition which the *cestui que trust* could never be expected to be able to perform? Again, as Mr. *Lloyd* remarked, the receipt of the interest, which was to be a fund for maintenance, a primary immediate object of the trust, was rendered altogether casual and uncertain—liable to be suspended and interrupted indefinitely by the prior incumbrancers. Surely, an act leading to such possible and probable consequences was, in itself, highly detrimental and injurious to those for whom he was bound so to invest the fund, as to secure the punctual payment of its interest.

I cannot, therefore, regard this investment of the £4100 as a due execution of the trust in the will to lend the assets on real security, and I am bound to act as if the defendant had the money in his hands. On the effect of the letters of the 15th and 24th of March 1837, I am not called on to give any opinion. Whatever that may be, between the respondents, and whether the respondent Nathaniel Montgomery should bear the whole or part or none of the loss caused by the breach of trust, in relation to the sum of £1500, I am not now to decide. For the reasons I have stated, I consider him privy and a party to that breach of trust; and, on the ordinary doctrine of this Court, I hold him and Lucas Waring bound to bring in the £1500; as to the £2600, the decree will be, of course, against Lucas Waring alone.

*Order.*

Let the respondents Nathaniel John Montgomery and Lucas Waring bring in and lodge in Court, to the credit of this

matter, within one month, the sum of £1500; and let the respondent Lucas Waring also, within the same time, bring in and lodge to the same credit the sum of £2600; and let the said last-mentioned lodgment be without prejudice to the accounts hereinafter directed. Refer it to Edward Litton, Esquire, the Master of this Court, in rotation, to take an account of the real and personal estate of the testator John Waring, deceased, in the petition mentioned, at the time of his decease—into whose hands the same came, and how applied and disposed of; and let an account be also taken of the said testator's debts, legacies and funeral and testamentary expenses; and in taking the said accounts, all just credits and allowances are to be given. And let the Master compute interest on such sums as he shall find, from time to time, to have come to the hands of the said respondent Lucas Waring. Let the petitioner Nathaniel Montgomery, as the next friend of the minor, pay the respondent Thomas Waring his costs in this matter, and refer it to one of the Taxing-masters of this Court to tax and ascertain the same. Let the present order be without prejudice to any proceeding which the trustee of the said settlement of the 11th of October 1833 may be advised to take against the respondent Lucas Waring, on foot of the bond of the testator John Waring, in the petition mentioned. Usual directions. Reserve further directions and the question of costs, &c.

*Reg. Lib. Gen. 7, f. 307.*

1852.  
*Chancery.*  
 WARING  
 v.  
 WARING.  
 Order.

## DQOLAN v. BLAKE.\*

Nov. 10.

The settlement recited an agreement to settle the lady's property for her sole use, free from her husband's debts, control, &c., and to be paid on the receipt only of the lady, or of such appointee as she should, by writing under seal, in each half year, for that purpose appoint; no such appointment to extend beyond half-a-year; but to be capable of being renewed half-yearly; and no act or authority whatever to be capable of empowering the husband, or any one deriving through him, to take the property; but the lady to have power and authority in every other respect to dispose of the same, and the accumulations thereof, by deed or will, at all times, &c., as she should think fit, as fully as if she had remained sole and unmarried: and in case of her dying intestate, the property, and all accumulations thereof, to pass to her heirs and next-of-kin. The settlement, after vesting the property (a portion of which consisted of two annuities or rentcharges) in the trustees thereof, proceeded to declare that they should have, receive and take said annuities from time to time, half-yearly, as same should become due or be paid; and after receipt thereof, pay over the net produce to the lady, on her own receipt, free from her husband's control, &c. And in a subsequent part of said settlement, it was declared that the trustees should carry into effect its true intent, &c., so as to maintain and apply to the sole use, &c., of the lady, and subject to her sole control, &c. (notwithstanding coverture), all and every her property, according as she should think fit, and so as to be payable into her own hands; and her own sole receipts, all in her own handwriting, and signed by her, to be the sole and only acquittances for the same.

After the marriage, and during the husband's lifetime, the lady joined in executing a promissory note to the petitioner, to secure a debt of her own, and the suit was to raise the amount out of the securities.

*Held*, that she was restrained during her husband's life from anticipating the annuities in that way; and accordingly the petition for a receiver over same was dismissed.

\* *Ex relatione* ALFRED M'FARLAND, Esq.

1842 (and executed on her marriage), it was recited :—“ And whereas it hath been agreed upon by and between the parties hereto, that all the property of the said Maria should be settled and secured to the sole use, benefit and behoof of the said Maria, without the control or intermeddling of her said intended husband, and free at all times from his debts, contracts or engagements, and to be received and receivable on the receipts only of the said Maria, or of such appointee as she shall by writing under her hand and seal, in each half year, appoint for that purpose; but no appointment, or power of any kind, whereby any person but the said Maria herself shall be entitled to receive the same, to extend longer than for one half year; but to be capable of being renewed from time to time half-yearly, by the said Maria, at her own sole will and pleasure; and no act or authority whatever to be capable of authorising or empowering the said Andrew N. R. Blake, her intended husband, or any person deriving from or under him, at any time, to take or receive the same; but the said Maria to have full power and authority, in every other respect, to dispose of her said property, and the issues and profits thereof, and of every part thereof, or of any accumulations thereof, by deed or will, at all times, and from time to time, as she shall think fit, as fully, to all intents and purposes, as if she had remained sole and unmarried; and free from all debts, liabilities and engagements of the said Andrew N. R. Blake, of every nature and kind whatever: and in case of the death of the said Maria, in the lifetime of the said Andrew, without making a will, then that the property of the said Maria, and all accumulations thereof, should pass to the heirs and next-of-kin of the said Maria, as if she had continued sole and unmarried.”

After vesting (amongst other property) the said two annuities in the trustees named therein, the settlement declared the trusts thereof as follows :—“ That the trustees, their heirs and assigns, should hold, receive and take the same, and the yearly rents, issues and profits, and payments of the said annuities, and every of them, and of every part and parcel thereof, from time to time, half-yearly, and according as the same shall become due

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and payable or be paid. And upon further trust, upon or immediately after the receipt thereof, to pay and hand over the net produce of same to the said Maria, upon her own sole and separate receipt, notwithstanding coverture, and free from any control or intermeddling of the said Andrew N. R. Blake, any thing to the contrary notwithstanding." And it was further provided "That the said trustees should carry into effect the trusts, and the true intent and meaning of the said settlement, so as to maintain and apply to the sole use, benefit and behoof, and subject to the sole and only control of the said Maria, notwithstanding her coverture, all and every the property of the said Maria, of every nature and kind whatsoever, according as she shall think fit, and so as to be payable only to or into her own hands; and her own sole receipts—all in her own handwriting, and signed by her—to be the sole and only acquittances for the same, any thing to the contrary," &c., &c.

The petition stated that, by the indenture of settlement above mentioned, the said two life annuities were vested in trustees for the sole and separate use of the said respondent Maria Grogan Blake, free from the control and debts of her husband; and that under the provisions of the said deed she was in receipt of those annuities; and that, being so possessed of said separate estate, she joined in a promissory note for £—— to the petitioner, which he took solely on her security, as he knew her to be possessed of said separate property, and the other joint makers were both insolvent; and that she herself proposed to pass said note, as appeared by a letter from her, to which petitioner referred.

The answering affidavits of the respondent Maria, after raising several questions of fact as a defence on the merits, submitted that the annuities were vested, in the trustees, from whom she could merely claim, half-yearly, the net produce—for which her own receipts would be their only discharge; and that she was in fact restrained from alienating same.

*Argument.*

The *Attorney-General* and Mr. *David Sherlock* stated the petitioner's case; and submitted that it appeared from the affidavits

on both sides, that the debt for which the note was given was clearly the respondent's own—that the note was taken on the sole security of her separate estate—and that the case did not come within the operation of the clauses in the settlement that provided against anticipation.

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Argument.

Serjeant *Christian* and Mr. *Jonathan W. Sherlock*, for the respondent *Maria G. Blake*.

It will be unnecessary to go into the merits of this case, the respondent being entitled to have the petition dismissed, upon the question of law. It is clear, upon the construction of the settlement, that she is restrained from anticipating her income; though framed somewhat differently from marriage deeds in general, yet, it most effectually prevents her from anticipating the annuities by any process save by an instrument under seal—and that, only, for one half-year's allowance at a time. The recital shows the intention of the parties, and if that recital was fully carried out in the body of the deed, the question could not admit of argument—nothing can be stronger than that recital; and it must be taken in conjunction with the trusts declared in the body of the deed, in order to give them their true construction, according to the intention of the parties. How, then, can the promissory note operate as an appointment? Can this Court say that an instrument not under seal shall, in contravention of the express words of the power, become effectual under the power? The remarks of Lord Eldon, in *Parke v. White (a)*, are directly the other way:—"I should hesitate long," observed his Lordship, "before I should say that, where there is a settlement by which a wife is under contract to have a free power to make a will during the coverture, this Court would act upon any instrument the object of which is to put that power under a control, that contradicts the whole effect of the contract upon marriage." The frame and intention of this instrument are, plainly, to give the lady a limited power of appointment, to be executed in a peculiar way—failing that, the property was to be enjoyed exclusively by herself during her lifetime, and to pass to

(a) 11 Ves. 231.

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*Chancery.*  
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*Argument.*

her representatives after her death. In the body of the the deed, the trustees are directed to receive the income half-yearly when same becomes due, and *then*, from time to time, to pay the net proceeds into her own hands; and on this part of the case, *Evans v. Field* (a) is an authority directly in point. The trustees in that case were directed to pay the rents, &c., after they became due, unto the lady or her appointee, so that the receipt of the lady or her appointee, after the rents became due, should be good discharges to the trustees; and Vice-Chancellor Shadwell held she could not anticipate her income. In addition to this, in the present case it is not only provided that Mrs. Blake's receipts shall be good discharges to the trustees, but the settlement goes further, and uses negative words—it being directly provided that her own receipts, in her own handwriting, shall be the *only* valid discharges to the trustees. *Browne v. Bamford* (b). There, the trust was to pay the rent to the lady or her appointee (with a non-anticipation clause), and in default of and until appointment, to pay same into her own hands, upon her own receipt, independent of her husband; and although the Vice-Chancellor held that the non-anticipation clause was not sufficient to restrain her from anticipating her income, he goes on to say that, in order to restrain the lady from anticipation, the receipt clause should contain negative words, and provide that none other receipt but her's should be a valid discharge to the trustees, which is exactly the proviso introduced in the present settlement: and on appeal, the Lord Chancellor held that it was not imperatively necessary that the receipt clause should contain negative words; and that, in the case before him, the restraint on anticipation was sufficiently binding. Besides, this Court cannot order the trustees to pay any one, unless on Mrs. Blake's receipt alone; and how can it compel her to sign any receipt, as it can only proceed against the estate of a *feme covert*, and not against her person?

Mr. *David Sherlock.*

The recital in this settlement shows that it is meant to apply to the debts and control of the husband only, and expressly provides

(a) 15 Sim. 375.

(b) 11 Sim. 127.

that the lady is in other respects to have absolute power over the property, and that it was the intention of the parties that she should be placed, as regards her separate property, in the position of a *feme sole*. From the beginning to the end of the deed, there is no clause which really goes to restrain anticipation; and it is necessary, in order to prevent a *feme covert* from anticipating her separate income, that there should be an express clause to that effect, and nothing repugnant to it. In many settlements where the clause had been inserted, it was disregarded, the context showing that it was the intention of the instrument to give the lady the absolute disposal of the property. Here, the context plainly evinces that such was the meaning of the parties to this deed; for it is stated in the recital, expressly, that Mrs. Blake should have the absolute disposal of the property. It is not necessary that the promissory note should operate as an appointment, for it is now held that the general engagements of a married woman are enforced against her separate estate—not as executions of a power of appointment, but as exercises of the right of property: *Owens v. Dickenson* (a). The case of *Murray v. Barlee* (b) is a strong one in favour of the petitioner; there, the married woman, having separate estate, employed an attorney to transact business for her, and by letter promised to pay him, without referring to her separate estate, and it was held that the estate was liable to the payment of his bill of costs. In *Bulpin v. Clarke* (c), a promissory note of the wife was held binding on her separate estate. In *Tullett v. Armstrong* (d), the principles respecting the separate estate of married women are fully laid down; namely, that it is in her hands liable to all the incidents of property. It would be one thing to hold that Mrs. Blake could alien or sell her estate, but quite another that she cannot make it liable to her debts; for the payment of the latter is an incident to her having separate estate. The argument that she has a power of appointment by deed only, and that the charge

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(a) Cr. & Phil. 53.

(b) 3 My. & K. 210.

(c) 17 Ves. 365.

(d) 4 My. & Cr. 405.

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*Chancery.*  
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 —  
*Argument.*

sought to be raised by the present suit, being but a promissory note, cannot operate as an appointment, so as to affect her separate estate, is now untenable; that doctrine is exploded. In *Owens v. Dickenson* it was finally settled, that the general engagements of a *feme covert* bind her separate estate in equity: in that case the lady retained an attorney to transact business for her, and it was held that her separate estate was liable to pay his costs. The separate existence of a married woman, with respect to her own property, settled on her, is a creature of equity; and the moment the Court recognises her separate property, it establishes every incident in relation to it, and makes it liable to her debts and engagements. She is then in the same situation as a man, and her estate is subject to the like liabilities. What can be stronger than these observations of the Lord Chancellor, in *Murray v. Barlee* (a)?—"The wife has a separate estate, subject to her own control, and exempt from all other interference. If she cannot affect it, no one can; and the very object of the settlement, which vests it in her exclusively, is to enable her to deal with it as if she were discovert." And again, "Nothing can more effectually defeat the purposes of such settlements than denying power to the wife to charge her estate." In *Thackwell v. Gardiner* (b), a bond was vested in trustees for the separate use of the wife, for life, remainder as she should appoint by instrument under seal; she caused the bond to be deposited with her husband's banker, and gave him a letter at the same time, guaranteeing the payment of advances to her husband, and charging the proceeds of the bond with same: it was decreed a charge on her life estate in the bond, though the Court held it did not operate as an appointment under the power. And in *Gaston v. Frankum* (c), where a *feme covert*, having separate property, agreed to take a lease, and the agreement was signed by the lessor, and handed to her for signature, but she did not sign same, yet went into possession, a decree was made against her, for specific performance, on the bill of the lessor.

(a) *Ubi supra.*

(b) 5 De G. & S. 58.

(c) 2 De G. & S. 581.

Mr. J. W. Sherlock, in reply.

The intention, as shown by the recital is clear ; first, that Mrs. Blake's property is to be free from her husband ; secondly, that she is to have the life enjoyment of it in a particular manner only ; and thirdly, that at her death it is to go to her own relatives, unless otherwise disposed of by her. Under the trusts of this settlement she has two rights, one a power to appoint every half year, by deed under seal, each half year's income, but no single appointment to extend beyond half-a-year. This is not the usual power given to a *feme covert*, but is restricted, and no appointment can be valid for more than half-a-year's income, and then only where it is under hand and seal, and made in pursuance of that power. The promissory note is not under seal, and does not come under the power, and this Court cannot compel a married woman to execute any instrument, for no decree can be made against her person : *Tullett v. Armstrong*. It can only proceed *in rem* : *Ashton v. Aylett (a)* ; and accordingly (where it interferes at all), the "Court gives effect to her contracts, not as personal liabilities, but by laying hold of her separate property, as the only means of satisfying her creditors : " *Owens v. Dickenson*. The other right that Mrs. Blake has under this deed is, that *after* each half-yearly gale of the annuities is received by the trustees, and undergoes a deduction of all necessary outgoings and costs ; she then can call on them from time to time to pay her the balance ; but she cannot claim any gale from the trustees until received by them, and those expenses have been deducted therefrom. *Field v. Evans* is therefore in point ; and she cannot anticipate or alien the accruing gales of these annuities. As to the argument that there are no direct words restraining anticipation, they are not necessary ; Lord Cranworth distinctly says so : *In re Ross' Trusts (b)* ; "for neither the words 'without anticipation,' nor any other particular form of words, are necessary for that purpose." And where it appears to be the intention to restrain a *feme covert* from anticipating, the Court will carry such into effect :—*Wagstaff v. Smith (c)*. The case of *Murray v. Barlee* has no application here,

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Argument.

(a) 1 M. & Cr. 111.

(b) 1 Sim. N. R. 199.

(c) 9 Ves. 524.

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*Chancery.*  
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*Argument.*

for that only decides that the married woman's separate estate is liable to her general engagements, which is perfectly true. The question here is, simply, whether the respondent can anticipate her income, under the trusts of this deed, by means of a promissory note? and it is to be determined upon the construction of the entire deed. The cases of *Barrymore v. Ellis* (a), *Browne v. Bamford* (b), and *Medley v. Horton* (c), which decided that the limitation to the separate use of the lady, until appointment, was not affected by the clause restraining anticipation, in the sentence giving her the power to appoint, were all overruled by Lord Lyndhurst, in *Browne v. Bamford*, on appeal, upon the ground that the true intention of the settlements was to restrain anticipation. Even in *Browne v. Bamford*, the same Vice-Chancellor, who there decided in favour of anticipation, and who usually attached as little weight as possible to clauses restraining anticipation, held, that negative words in the receipt clause would be an effectual bar to anticipation. Such is the present case—here, negative words are used; but none of the other Judges went so far as to deem them absolutely necessary: *Hartop v. Howard* (d); *Harnett v. M'Doughal* (e). And in *Moore v. Moore* (f), Sir L. Shadwell appeared to overlook his former decisions; and in that case the restraint clause is not so strong as in the present. The distinction attempted to be taken between alienating and incurring debts is answered by *Browne v. Bamford*, which was the case of a guarantee. The argument that a *feme covert*, with separate property, is to be treated as a *feme sole*, and her property to be liable to the same incidents as that of a man, has been put too strongly; for in the case of a *feme sole*, or a man, you cannot settle property on them, so as to give them the absolute use and benefit of it, and yet restrain their anticipating it: *Brown v. Pollock* (g); *Jones v. Salter* (h). That peculiarity exists in the case of a *feme covert* alone; and even with respect to it, "the restraint from alienating is annexed to the separate estate only,

(a) 8 Sim. 1.

(c) 14 Sim. 222.

(e) 8 Beav. 1.

(g) 5 Sim. 663.

(b) 11 Sim. 127.

(d) 3 Hare, 626.

(f) 1 Coll. 54.

(h) 2 Russ. &amp; M. 208.

and that separate estate has its existence only during coverture:" *Tullett v. Armstrong*. The distinction between "*separate estate*," and "*separate estate without power of anticipation*," is clear; yet the arguments of Counsel on the other side recognise no such distinction; although in *Owens v. Dickenson*, upon which they so much rely, that distinction is obviously taken by Lord Cottenham. In other respects, the decision in that case—being one of a will by the lady, charging her separate estate with her debts, and that estate being settled merely to her separate use, independent of her husband, but not restrained from being anticipated—cannot apply.

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—  
Argument.

The LORD CHANCELLOR.

Having carefully considered the construction of the marriage settlement in this case, I have come to the conclusion that I cannot interfere, so as to afford the petitioner any relief. Where a married woman has property settled to her separate use, independent of the control of her husband, she is treated by a Court of Equity, in her dealings with that property, as a *feme sole*, so far as her dominion over that property extends. A large class of cases have now established, beyond controversy, that property can be settled to the separate use of a married woman, so as to give her the exclusive benefit of it, and yet exclude her power of anticipating the income. This may be done in the instrument creating the trust fund, either by general terms, or by express words; and in such cases it is always a question of construction, upon the whole context of the instrument. It is clear that the words, "without power to anticipate," will have that effect; still, no set form of expression is necessary; but if the Court can collect from the entire instrument that it was the intention to restrain anticipation, the Court will effectuate that intention, though it should not be expressed in any particular form of words.

Nov. 11.  
Judgment.

The language made use of by Lord Cranworth, in *Ross's Trusts*, referred to in the argument yesterday, is an express authority for that proposition: he says, "The words attributed to Lord Cottenham, in the report of *Scott v. Davies*, namely, that the decisions seemed to require that the intention to restrain a married woman

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from anticipating property, settled to her separate use, should be expressed in a particular form of words, and that anticipation should be in terms prohibited, could not have fallen from his Lordship; for neither the words 'without anticipation,' nor any other particular form of words, are necessary for that purpose." We now come to the case of *Browne v. Bamford*, decided by Vice-Chancellor Shadwell, and at first confirmed by Lord Lyndhurst on appeal, but subsequently overruled by the same Judge on a re-hearing. In that case, the trusts were to pay the income to the lady's appointee, but without power to her to anticipate, and in default of appointment to pay into the hands of the lady, for her sole use, independent of her husband, &c.; there, the Vice-Chancellor held that the restraint on anticipation was confined to the power of appointment, and did not affect the trust in default of appointment; but the Lord Chancellor held that the clause against anticipating overrode the entire trusts, although in terms confined to the power. A similar principle is deduced from the case of *Moore v. Moore* (a), where the estate was given to the *feme covert*, generally, in default of or until appointment; and yet the Court held the true meaning of the instrument was, that the estate so given to her generally until appointment should be made subservient to the clause restraining anticipation, contained in the previous sentence, giving her the power of appointment. The decision in *Field v. Evans* (b) illustrates both cases; in it the trustees were directed to take the rents, &c., when the same should become due, and pay them to the lady or her appointee, so that her receipts or those of her appointee, after the rents were due, should be valid. There, though there was no clause restraining anticipation, the Vice-Chancellor held she could not alien the future rents. Looking over the present settlement, then, it is necessary to revert to *Browne v. Bamford* (both before the Vice-Chancellor, and also on appeal): the Vice Chancellor, in effect, held that negative words (such as are used here), in the receipt clause, would effectually restrain anticipation; and the Lord Chancellor held that the non-anticipation clause was not confined to the power, but overrode

(a) 1 Coll. 54.

(b) 15 Sim. 375.

the entire settlement. The true construction of the settlement before me appears to be, that the respondent shall not anticipate; it is recited, &c.—[His Lordship read the principal recital, and continued]:—If that recital had been formally carried out, it would be hard to contend that Mrs. Blake could charge these annuities in the way now relied on; and that recital must be taken in connection with the subsequent clauses of the deed. The true construction to be thus deduced from the entire instrument, appears to me to be, that it effectually restrained the respondent from anticipating this property. The case of *Owens v. Dickenson*, referred to at the Bar, does not affect the question of anticipation; and in the case of *Murray v. Barlee*, also cited at the Bar, there were two funds settled to the separate use of the lady, as to one of which she was restrained from anticipating the profits; and I find, upon reference to the decree, as stated in 3 *M. & K.* pp. 212 & 213, that it was expressly confined to the funds unaffected by the non-anticipation clause.

Petition dismissed.

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*Chancery.*  
DOOLAN  
v.  
BLAKE.  
Judgment.

RYAN v. LEFROY.\*

May 28.

THE petition in this case was for a receiver, under the Judgment Acts, 5 & 6 *W. 4*, c. 55, and 3 & 4 *Vic.*, c. 105, on foot of a judgment recovered in Trinity Term 1848, by the petitioner against A. G. Lefroy. The judgment was revived in Hilary Term 1853. On the 3rd of July 1851, A. G. Lefroy mortgaged the greater part of the lands mentioned in the petition, to Mrs. Johnstone. In October 1851, a commission of bankruptcy issued against A. G. Lefroy, and in the course of the same month he was adjudged a bankrupt. The mortgage deed contained a power to appoint a receiver, which had been acted on; but upon the bankruptcy, the mortgagee took possession.

After a judgment debtor has become bankrupt, a receiver cannot be appointed on petition of the judgment creditor, though cause is shown only by a puisne mortgagee in possession.

\* *Ex relatione* ALFRED M'FARLAND, Esq.

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*Chancery.*

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—  
*Statement.*

sion of the lands, by naming her own agent, and insisted on her right as a mortgagee in possession. The petition in this matter was presented on the 5th of February 1853; and the usual conditional order for a receiver having been obtained, Mrs. Johnstone, the mortgagee, filed an affidavit as cause against its being made absolute, relying, amongst other things, on the bankruptcy of A. G. Lefroy. The Master of the Rolls disallowed the cause, and the order for a receiver was made absolute. Against this order the mortgagee appealed.

*Argument.*

Mr. *Fitzgibbon* and Mr. *J. E. Walshe*, for the appeal, contended that the statute 3 & 4 *Vic.*, c. 105, sections 21 & 22, did not give any preference to judgments in bankruptcy; but at all events that any doubts as to its operation, and the effect of the decision *In re Perrin* (a) were put an end to by the recent statute, 12 & 13 *Vic.*, c. 107, s. 108, which restored the law as it was under 6 *W.* 4, c. 14, s. 126, and levelled all judgments in bankruptcy; and that the circumstance of the mortgagee being in possession made no difference, as, if the judgment creditor were allowed to levy his demand against the mortgagee, the mortgagee could plainly recover her demand afterwards against the bankrupt's estate, and thus the judgment creditor would indirectly get the very preference over other creditors which the Bankrupt Act intended to deprive him of. They referred to the statutes 5 & 6 *W.* 4, c. 55, ss. 31 & 37; 3 & 4 *Vic.*, c. 105, s. 21; 12 & 13 *Vic.*, c. 107, s. 108; 6 *W.* 4, c. 14, s. 126; 2 & 3 *Vic.*, c. 86; 7 & 8 *Vic.*, c. 90, s. 36; and cited *Baker v. Pettigru* (b); *Burt v. Bernard* (c); *Reid v. Davis* (d); *Whitmore v. Robinson* (e).

Mr. *Deasy* and Mr. *Harkan*, contra, contended for the petitioner, that as the assignees of the bankrupt did not intervene, the question was to be regarded simply as between the mortgagee and the receiver; that the former was the absolute owner of the lands at

(a) 4 Ir. Eq. Rep. 89, 362.

(b) 2 Ir. Eq. Rep. 144.

(c) 4 Ir. Eq. Rep. 326, and, on appeal, 5 Ir. Eq. Rep. 425.

(d) 3 Ir. Eq. Rep. 153.

(e) 8 M. & W. 463.

law, and could not have any defence there to an elegit, and that the appointment of a receiver was available wherever an elegit was, being merely a substitute for the latter; that the provisions in the Bankrupt Act only applied to a distribution of the funds in bankruptcy, and not to a proceeding like this, which was simply a struggle between two creditors, one or other of whom should get the fund, the assignees, in effect, rejecting the property. They relied on *Baldwin v. Belcher* (a), and argued that the principle of that decision ruled this case. They also cited *Hanson v. Stevenson* (b). It was suggested, too, that the property was so deficient in value that nothing would be distributable in the bankruptcy, and as the mortgage would entirely absorb it, the mortgagee was really the owner; but as the affidavits did not establish this, and an offer of leave to make a further affidavit on the subject was declined, the case was argued on the assumption that the relative value of the debt and property were unascertained or immaterial.

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*Chancery.*  
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v.  
LEFROY.  
*Argument.*

The LORD CHANCELLOR observed that *Baldwin v. Belcher* was a case between two mortgagees, and had nothing to do with the estate of the bankrupt; that the 126th section of the 6 W. 4 c. 14, contemplated the very case of a mortgagee, as contrasted with a judgment creditor; that it was unnecessary to say what the effect of the section would be in a case where the assignees clearly rejected the property,—as that was not the case here, where the respondent appeared to be only in the ordinary position of a mortgagee in possession, and liable to account to the assignees; that he did not think an execution at law could in the present case be enforced; and that it would be allowing the entire machinery of the Act to be evaded by a side-wind, if the judgment were to be paid in full whenever there was a subsequent mortgage, which in the end must come out of the bankrupt's estate, as the mortgagee's demand, admittedly, should be paid afterwards. His Lordship, therefore, allowed the cause, as to the lands included in the mortgage, as to which cause was shown.

*Judgment*

(a) 1 Jo. & Lat. 18; S. C., 6 Ir. Eq. Rep. 424.

(b) B. & Al. 303.

1853.

*Chancery.*

## LANAUZE v. MALONE and Wife.\*

Dec. 3.

A marriage settlement recited an intention to secure a jointure for the wife; and the property (which was the husband's) was vested in trustees to secure same, and subject thereto, upon such uses and for such persons as the husband should appoint by deed or will, and in default thereof, for the children of the marriage, share and share alike.

*Held*, that the

power was a general one, and not restricted to children of the marriage by the subsequent limitation in their favour.

The settlor, by his will, referred to the settlement, and confirmed the jointure, and bequeathed the lands *nominatim*, and all his other property, to trustees for the benefit (in the events that happened) of his only daughter (who afterwards died under age, &c.), with remainders over, but he did not refer to the power.

*Held*, that the power was well executed by the will in favour of the first remainderman.

By the will the testator bequeathed the lands of K. (held under a Bishop's lease, renewable every seven years), and all his other property (being personal), to trustees, upon trust to pay the rents and other outgoings of K. as therein, and to preserve the interest in said lands by keeping up the renewals; and, after giving certain legacies, he bequeathed the residue of the lands of K., and the other property, to his daughter, her executors, &c.; but in case of her death, under age and unmarried, then over. On the testator's death, the daughter was a minor, and made a ward of Court; and the other personal estate not being sufficient for payment of his debts, the greater part of same were paid out of the rents of K., by the receiver in the minor matter, and renewals were also obtained, and the fines paid in like manner. The daughter died under age and unmarried, and a remainderman took.

*Held*, that the personal representative of the minor was entitled to be repaid the principal money of such of the testator's debts as were paid out of the rents of K. during the minority, and which the other personal estate was insufficient to discharge, with interest thereon from the minor's death.

*Held also*, that the minor and remainderman were bound to contribute to the renewal fines, in proportion to the actual advantage they respectively obtained from the renewals.

\* *Ex relatione* ALFRED M'FARLAND, Esq.

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in consideration of the marriage, and for the purpose of creating a jointure for her, vested in trustees, upon trust, that they, after payment of head rent and renewal fines, should suffer the said John George Lanauze to receive the rents for life; and after his decease, in trust, to secure a jointure for the said lady, in case of her surviving him, with the usual powers of distress, and subject thereto that the trustees should stand possessed of the lands, upon trust, to and for the use and behoof of such person or persons, and to and for such uses, intents and purposes as the said John Lanauze should, by deed or will as therein, direct; and in default of such appointment, or so far as any such appointment should be insufficient, upon trust, for the children of the intended marriage, share and share alike, as therein mentioned. The settlement also contained a proviso, that in case of the death of the lady before the said John George Lanauze, the trustees should re-convey to him.

The said John George Lanauze made his will, dated the 19th day of February 1834, and thereby reciting that, by his marriage settlement, he had created a jointure for his wife, he confirmed same, and then bequeathed the said lands of Kill, and all his other property (being entirely composed of personal estate), unto trustees, upon trust in the first place, from time to time, and at all times, to preserve testator's interest and tenant-right, by duly paying the head rents to the proper landlords; and secondly, to pay to the parties entitled all fines, for enabling the trustees to obtain renewals of his said lands, and then to pay all taxes and duties affecting the same. And the testator, having next bequeathed several pecuniary legacies, gave all the residue of his interest in said lands, and all the residue of his other personal estate—subject to the trusts thereinbefore mentioned—unto (in the event which occurred) his only daughter, her executors, administrators and assigns; but in the event of his daughter dying under the age of twenty-one years and unmarried, testator bequeathed the residue of the lands and other property unto the petitioner George Lanauze, and in case of his death under age, then over.

The testator died in the year 1837, leaving his wife and said

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daughter, his only child, him surviving. In the year 1839, the latter was made a ward of Court; and her mother, the respondent, Eliza, in the absence of the executor of the will, took out administration *cum testamento annexo*, and passed an account before the Master of all the other personal estate left by the testator. During the minority, several debts of the testator were paid off out of the rents of the lands of Kill, by the receiver in the minor matter, under orders of the Court, and renewals were also obtained, the fines being paid in like manner.

The minor died in 1851, under age and unmarried; her mother obtained administration to her, and intermarried with Malone, the other respondent; and they continued in possession of the lands, and obtained a renewal to themselves, claiming through the deceased minor.

The points raised by the answering affidavits were four:—first, that the power of appointment in the settlement (under which, in connection with the bequest in the testator's will, the petitioner claimed), though apparently general, was restricted to children of the marriage, by reason of the limitation to them in default of appointment; secondly, that if the power was general, yet the will (not referring to it) was not a valid execution of it; thirdly, that in case the power was well executed, the respondents were entitled to be repaid such of the debts of testator as were paid during the minority out of the rents of the lands, with interest, from the minor's death; and fourthly, that the petitioner was bound to contribute to the payment of the renewal fines.

*Argument.* Mr. Francis Fitzgerald, Mr. B. Lloyd and Mr. Coffey, for the petitioner.

Mr. Serjeant O'Brien, Mr. Serjeant Christian and Mr. Jonathan Sherlock, for the respondents.

The arguments appear from the judgment, and the following cases were cited:—

First point.—*Mildmay's case* (a); *Bristoe v. Ward* (b); *Cooke v. Bristoe* (c); *Peddie v. Peddie* (d).

(a) 6 Coke, 175 a.

(c) 2 Dr. & Wal. 596.

(b) 2 Ves. jun. 336.

(d) 6 Sim. 78.

Second point.—*Jones v. Jones* (a); *Anson v. Lee* (b).

Third point.—*Drinkwater v. Coombe* (c); *Harris v. Poyner* (d).

Fourth point.—*Ker v. Robins* (e); *Allen v. Blackmoor* (f);  
*Capel v. Wood* (g); *Ploytus v. Abbot* (h); *Jones v. Jones* (i).

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In this case, the testator John George Lanauze, prior to his marriage with Eliza Stafford, now Eliza Malone, one of the respondents, was possessed, amongst others, of the lands of Kill, held under a bishop's lease for twenty-one years, renewable by custom every seven years, upon payment of a large fine; and by the settlement, executed by Mr. Lanauze on the occasion of that marriage, the said lands were vested in trustees, upon trust for the testator for life; and after his decease, upon trust to secure a jointure for his wife surviving him, and subject thereto, upon trusts for such person and persons, and to, for and upon such uses, intents and purposes, as the testator should, by deed or will, appoint, and in default thereof, then for the children of the marriage, share and share alike, as in the settlement mentioned. The marriage took place, and the testator afterwards made his will, without referring to the power, but noticing the settlement, and confirming it. He bequeathed, amongst other things, the lands of Kill to trustees, upon trust, to preserve his interest therein by payment of rent, taxes and renewal fines; and then, as to the residue of said property, subject to the jointure for his wife, upon trust (in the events which occurred), for his only daughter, with an executory bequest over to the petitioner, in case of her death under age and unmarried. The testator died, and his daughter was made a ward of Court, and died unmarried and under age; administration has been taken out to her by the respondent Eliza Malone, who became the wife of the respondent Charles Malone, after the testator's death.

Judgment.

(a) 10 Jur. 960.

(c) 2 S. & St. 340.

(e) 2 Jur., E. 773.

(g) 4 Russ. 500.

(b) 4 Sim. 364.

(d) 1 Drew., E. 174.

(f) 2 V. & B. 65.

(h) 2 M. & K. 109.

(i) 5 Hare, 440.

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The petition has been presented for the purpose of having the will carried into effect, and a declaration obtained, that the petitioner is entitled to the lands. The respondents, on the other hand, insist that, upon the construction of the settlement, the power of appointment given to the testator thereby was not a general power, but one that should be restricted to children of the marriage; and that even admitting the power to be a general one, it was not well executed by the will. As to the first of these questions, it has been contended that the meaning of the settlement was, to provide for the wife and children of the settlor, and that such intention is shown by the provision, that in case there should be no children of the marriage, the trustees should re-convey to the settlor; and the case of *Bristoe v. Ward* has been relied on, with others. Now, I cannot agree with this construction; the recital in the settlement clearly shows the meaning to be, to make a provision for the wife only—[His Lordship read the recital];—and the words of the power are most general in their nature—none more so—while the limitation in default of appointment to the children seems to be made for the purpose of securing to them a provision, in case of the intestacy of the settlor. From beginning to end, the terms of the settlement, save as to that one limitation, contemplate a provision for the wife alone, and evince no intention of making an absolute provision for the children. How, then, can I cut down the terms of a power most general in its nature, and in perfect accordance with the meaning of the settlement, unless the intention that it should be so restricted appears on the face of the deed, the contrary of which is the fact? The case of *Bristoe v. Ward* was strongly relied on; and other cases were cited in support of that authority. Now, the case of *Bristoe v. Ward* is very different from the present one; that was a case of marriage articles, where equal portions of the property of the gentleman and of the lady were agreed to be settled on the husband, for the joint lives of himself and wife; and in case he died first, leaving issue by her, then to her for life, with remainder, as to the principal, as he should appoint generally, or in default thereof, to the children, share and share alike. A

settlement was subsequently made, in pursuance of the articles, and the property was vested in trustees, upon trust, after the death of the survivor of the husband and wife, for the children of the marriage, as the husband should appoint—thus showing the construction the parties themselves put upon the articles, and their own intention. Lord Rosslyn there decided, that the power in the articles was properly restricted by the settlement to a power of appointment amongst the children, from the nature, terms and construction of the articles. As I have said, the property agreed to be settled by the articles was partly the husband's and partly the wife's; and the words of the power in the articles were, merely, that the trustees should apply the principal as the husband should appoint. Here the property is the husband's; the instrument is a settlement, and not articles. The recital is confined entirely to the making of a provision for the wife, and the words are altogether different from those in *Bristoe v. Ward*, being, "for such person or persons," clearly showing the intention not to restrict the power. The case of *Mackinley v. Sison* (a) is extremely like the present. It was a bequest by a testator of a sum of stock, to trustees, for his daughter for life, and after her death, in trust, for such persons and for such purposes as she should by deed or will appoint, and in default of appointment, for her children. There the power was held to be a general one; Sir L. Shadwell saying, "It is plain that the clause creating the power contains no restriction whatever, as to its objects;" and, referring to the case of *Bristoe v. Ward* (which he does not seem to approve of), he remarks, "I cannot help observing, that upon reference to the articles which are stated in the commencement of the report, it appears to me strange to say, that the construction to which Lord Rosslyn alludes was not the natural construction of the words of the instrument. It is plain, however, that the construction which his Lordship put upon the articles was adopted by him mainly upon the grounds that the nature and purposes of the instrument required it." *Mackinley v. Sison* is precisely in point; and with-

(a) 8 Sim. 561.

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out in any manner infringing upon the decision in *Bristoe v. Ward*, I must hold the power in this deed to be a general one.

The next question raised is on the construction of the will; and the respondents contend that it is not a good execution of the power. I am clearly of opinion that the power is validly executed by the will. The property dealt with by the will is the very subject-matter of the power; the testator refers to the property as his, and settles it in a manner totally inconsistent with any ulterior interest he had therein, and which could only operate as an execution of the power. The subject-matter of the power is absolutely disposed of; and the intention to execute the power is clear. I must declare the will a valid execution of the power.

As to the renewal fines, I am of opinion that the testator's daughter, Mary Anne Lanauze, and the petitioner, were bound to contribute thereto, in proportion to their respective enjoyment of the property. The testator, it is true, directs his trustees to preserve his interest in this property, by paying the renewal fines from time to time; but it has been repeatedly ruled, that a direction to trustees to pay fines from time to time, when no specific fund is created for such payments, is not sufficient to throw upon the tenant for life the onus of paying the fines out of the rents and profits which accrued due during his enjoyment of the estate. The general rule is clearly laid down, in the case of *Jones v. Jones*, cited at the Bar, and also in the very recent case of *Huddleston v. Whepsdals (a)*, following many others, the principal of which have been cited at the Bar. Upon this point, I must declare that the minor and petitioner were bound to contribute to the renewal fines, in proportion to the actual advantage they respectively obtained from the renewals.

With respect to the payment of the testator's debts, and the right of the respondents to be recouped, this case does not differ from that of a tenant for life paying off the charges that affect the inheritance. The case of *Drinkwater v. Coombe*, cited at the Bar, is in point, and I must declare that the respondent Mrs. Malone, and her hus-

(a) 9 Hare, 775.

band, in her right are entitled to be repaid the principal money of such of the testator's debts as were paid out of the life estate of the minor, and which the other personal estate of the testator was insufficient to discharge, with interest thereon from the death of the minor.

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March 16.

THE facts of this case are fully stated in the judgment of the Master of the Rolls, (*supra*, vol. 2, p. 648).

Mr. *Wm. Smith*, for the appeal.

Mr. *Lawson* and Mr. *R. R. Warren*, contra.

In addition to the cases mentioned in the Rolls and by the LORD CHANCELLOR, the following were cited:—*March v. Russell* (a); *Hunt v. Bateman* (b); *Harding v. Grady* (c); *Francis v. Grover* (d); *Jenkins v. Roberts* (e); *Clifford v. Lewis* (f); 1 *Eq. Abr.*, p. 384.

The LORD CHANCELLOR.

This case has been brought forward before me on an appeal from an order pronounced by the Master of the Rolls, on the 3rd of November 1853, by which he reversed a decretal order

In 1811, T. H. executed a bond, in which his heirs were not bound, and on which he paid interest until his death, in 1820. T. H. made his will, by which he left all his property to W. H. H., and directed that all his just debts, legacies, and funeral expenses should be paid by W. H. H., whom he appointed executor. W. H. H. proved the will, and alienated the lands in 1821, without receiving a pecu-

niary equivalent; he, however, paid interest on the bond until he died in 1843. The parties claiming under the deed of 1821 paid interest up to 1849, under a mistaken belief of their liability. A cause petition was filed in 1853, to recover the amount of the bond, from the representatives of W. H. H. Held (affirming the order of the Master of the Rolls), that the claim against W. H. H., being founded on a breach of a trust created without a specialty executed by him, was a simple contract debt, and as such barred by the Statute of Limitations, 10 Car. 1, sess. 2, c. 6, s. 3 (*Ir.*)—[*Dunne v. Doran*, 13 Ir. Eq. Rep. 546, supported].

(a) 3 M. & C. 13.

(c) D. & War. 340.

(e) 22 Law Jour., N. S., 874.

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(b) 10 Ir. Eq. Rep. 360.

(d) 5 Hare, 39.

(f) 6 Mad. 33.

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made by Master Murphy, and directed that the petition should be dismissed, without costs. By their appeal, the petitioners seek that the order of the Master of the Rolls should be reversed, and that I should affirm the order of Master Murphy. The facts of the case are so fully detailed in the judgment of the Master of the Rolls, of which a copy has been supplied to me by his Honour, that I do not feel it to be necessary minutely to go into them. The short outline of it is, that the petitioners seek payment, out of the assets of William Henry Hutchinson deceased, of whom the respondents are the personal representatives, of the sum of £800 of the late currency, for which a bond was given by Thomas Hutchinson, the father of William Henry Hutchinson, on the marriage of the petitioner Anne, to the petitioner John Brereton, and Robert Kenny (who is since deceased), as trustees of the settlement executed on that occasion; and they seek this relief against those assets, on this special ground, that under the will of Thomas Hutchinson the obligor, William Henry Hutchinson took estates thereby devised to him, affected by a trust for payment of the debts of the testator, and in violation of that trust aliened those estates by his marriage settlement, so that no direct relief can now be had against them; and they insist that this act constituted a breach of trust on his part, in respect of which his personal estate is now liable to make good the amount of that security for £800, and interest. The petition, being in effect for the administration of the assets of William Henry Hutchinson, was referred to the Master, under the provisions of the 15th section of the Chancery Regulation Act, and he came to the conclusion that the petitioners had established their claim, and that the demand was not barred by the Statute of Limitations, which constituted one of the defences relied on before him on the part of the respondent.

The case having been brought, by appeal from this decision of the Master, before the Master of the Rolls, his Honour appears to have concurred with the Master in the views taken by him of the rights of the petitioners, except so far as regards the defence of the Statute of Limitations, which he ruled to be a valid defence. In his judgment, however, he expressly declared that he so decided the

case against his own opinion, but as considering himself bound to follow the decision of the Court of Exchequer in the case of *Dunne v. Doran* (a). From that judgment the present appeal has been brought by the petitioners, and their claim has been resisted here by the respondents, as well on the defence of the Statute of Limitations as on the ground that in fact the petitioners had no demand against the assets of William Henry Hutchinson. To support that proposition, it is contended that, in fact, the debts of Thomas Hutchinson were not charged upon the lands devised by his will to William Henry Hutchinson; or that if they were, the latter was not a trustee of those lands for payment of the debts, as stated in the judgment of the Master of the Rolls.

Thomas Hutchinson, by his will, devised to William Henry Hutchinson, who was his only son and heir-at-law, certain estates therein particularly mentioned, together with all the property, real and personal, of which he should die possessed, save as therein-after mentioned, and chargeable, as thereafter mentioned, for ever; and after certain bequests, not material to the present question, directed that all his just debts, legacies and funeral expenses should be paid by his said son, William Henry Hutchinson, whom he appointed sole executor. Now, I think it is very plain that by these devises and declarations the testator intended that his debts should be charged on the lands devised; and by the direction that they should be paid by his devisee, it is, I think, equally plain, that the latter is constituted a trustee for payment of them. The case in this respect resembles *Morse v. Langham*, cited at page 286 of the report of *Burke v. Jones* (b). It is true that in *Shiphard v. Lutwidge* (c) there was an express charge of debts, and so no question could then arise on that point; but it was further held in that case that the devisee was a trustee, although there was not there, as here, a direction that the debt should be paid by him. The case is not like *Dundas v. Blake* (d), and others of the same class, where the devise was merely of property, subject

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(a) 13 Ir. Eq. Rep. 546.

(b) 2 Ves. & B. 275.

(c) 8 Ves. 26.

(d) 11 Ir. Eq. Rep. 138.

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to charges, without more to intimate that any personal duty was cast on the devisee in respect to the payment of them.

I would infer from the Master of the Rolls' judgment, that this point was not much contested before him, as he contents himself with simply declaring that William Henry Hutchinson was, under the will of his father, a trustee for payment of the debts; and refers to the case of *Shiphard v. Lutwidge*, without any further discussion of the question. In this state of things, it follows that, when William Henry Hutchinson conveyed away these estates, on his marriage, without paying the debt due to the petitioners, he committed a breach of trust, for which, in this Court, he and his assets would be held liable; and the case is then reduced to the single question, whether, as against his assets in the hands of his personal representatives, the demand of the petitioners, founded on that liability, is barred by the Statute of Limitations?

Some questions appear to have been discussed before the Master of the Rolls, as respects this defence, which were not opened here, viz., as to whether there had not been payments of interest, &c., on this demand, sufficient to keep it alive; but his Honour satisfactorily disposed of that part of the case, by showing that the payments alluded to had been made by other parties, whose acts could not bind the respondents; and therefore the question depends altogether on the effect of the time which has elapsed, and on the question whether the demand is in its nature one to which the Court can apply the analogy of the Statute of Limitations.

William Henry Hutchinson, having been a trustee, could not in his lifetime rely on any such bar, as against the petitioners, his *cestui que trusts*; but he died in the year 1843, and this cause petition was not filed until 1853, a period of ten years after his death. According to all the authorities, this demand in its nature is, against his assets, merely a simple contract debt, being founded on a breach of trust, not created by any specialty to which he was a party—that is, it is to rank as such in the administration of those assets, and this has not been controverted. But it is contended that there is something peculiar in the origin and character of it, which is to exempt it from the operation of the statute, and to place it on

higher ground in that respect than ordinary debts of the same rank, and such was the opinion announced by the Master of the Rolls, as that entertained by him, and on which he would have acted, did he not feel himself bound by the case of *Dunne v. Doran*, to which I have already referred. That was a case of a bill filed by one of the next-of-kin of an intestate, whose administrator had received assets more than sufficient for the payment of the debts, and consequently became liable to a demand, on the part of the plaintiff, for a distributive share of the surplus. The administrator, however, had died without paying the plaintiff's share, having devised real estate, and the bill was filed to make that real estate liable, under the 3 & 4 W. 4, c. 110, to the debt thus created against the assets of the administrator; but the demand being only for a simple contract debt, and the bill having being filed twelve years after the death of the administrator, the Court of Exchequer held that the Statute of Limitations was an answer to the demand; and in the report given of my judgment as Chief Baron, in which the other members of the Court concurred, I am reported as saying, "This is the case of a simple contract debt, sought to be attached upon the deceased debtor's real estate, and it must, therefore, abide the rule common to it, with all other simple contract debts, of being barred by the Statute of Limitations after six years." That case, if rightly decided, is an authority for the proposition on which the respondents rely, that a debt arising out of a breach of trust, being but a simple contract debt, is, as against the assets of the deceased trustee, within the operation of the Statute of Limitations, as applied in this Court, if the suit be not brought until after the expiration of six years from the death of the trustee; and unless on principle or better authority it can be shown that that decision was erroneous, it must rule the present case.

The main scope of the observations of the Master of the Rolls, in opposition to that decision, is to show that such a debt as this was not within the Statute of Limitations, 10 Car. 1, sess. 2, c. 6, s. 3 (*Ir.*); 21 Jac. 1, c. 16, s. 3 (*Eng.*)—it not being, as he says, "a debt grounded on any lending or contract without specialty, but rather, if a debt at all, *debitum ex delicto*, founded on the

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breach of trust or devastavit of William Henry Hutchinson, and not founded on lending or contract. In support of this view, the case of *Hodsden v. Harridge* (a) was cited and relied on by the Master of the Rolls, as a case in which it was held that an award, the submission not being by specialty, was not within the statute 21 *Jac.* 1, c. 16, because it was not "a debt founded upon a lending or contract." This case, his Honour stated to have been recognised as law, by the recent statutes of the 3 & 4 *W.* 4, c. 42, in force in England, and the corresponding enactment for Ireland, 3 & 4 *Vic.*, c. 105, s. 32, which statutes, as he states, limit the period of actions on award, when the submission is not by specialty, to six years. His Honour also refers to the cases where it is held that an action of debt for an escape, or for a copyhold fine, or against a Sheriff for money which he had levied under a *fiери facias*, was not within the 21 *Jac.* 1, c. 16, as not being debts grounded on a lending or contract.

Now, in this argument it appears to me that the words of the statute have been altogether overlooked or disregarded, and the effect of the decisions equally misapprehended. We have only to refer to the section of the statute itself to establish this. It does not enact, that all actions *for debts*, grounded on any lending or contract, without specialty, shall be brought within the time limited, and not after; but the words are, "all actions *of debt*, grounded upon any lending or contract, without specialty," shall be so brought. The case of *Hodsden v. Harridge* decides no more; it is a case of an action of debt on the award; so were the cases of actions for escapes, copyhold fines, and moneys levied by Sheriffs. The statute, and the cases on it, are conversant about the form of the action, as applied to the nature of the demand; and the suit in some other form, if any such can be entertained, for the same demand which, if sued for in debt, would not be within the statute, will be subject to the operation of the words of the statute applicable to the form selected. If the demand be one which cannot otherwise be sued for than in an action of debt, and it be not founded on a contract or

(a) 2 Saund. 65.

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lending, then it is, in such form of action, without the bar of the statute; but if it be one which may be enforced at the option of the plaintiff, in another form of action, or cannot be made the subject of an action of debt, at all, then, according to the form of action which may be adopted, the statute will apply to the case, although, had debt been the remedy chosen, the contrary result would have ensued. And this distinction is applicable to all the instances alluded to by the Master of the Rolls; thus, debt, on an award made on a parol submission, is not within the bar of the statute; but if assumpsit be brought on the submission (which I may observe is the only form in which an executor or administrator can be sued at law in such a case), then the provisions of the statute will limit that action to a period of six years. So as to an escape; the action of debt for an escape is not within the statute; but if the party injured choose, as he may, to proceed for the same escape in an action on the case, the latter action will be within the bar. So of debt for a copyhold fine; such fines may also be sued for in assumpsit, and if that were the form of action selected, it would be within the statute. Thus also, though the action of debt against a Sheriff, for money levied under a *feri facias*, will not be barred, yet if the party chooses to demand the money in another form of action (as he may, *Parkinson v. Lilford* (a)), such form of action will be open to different considerations, and the defendant may rely on the statute against it.

However, I apprehend a Court of Equity pays no regard to the forms of Common Law actions, in determining the nature of a debt in the administration of assets, but regards all demands which are not debts of specialty, or of a higher nature, as debts by simple contract; and I am not aware of any case in which, as regards the Statutes of Limitations, this Court has ever recognised distinctions among debts, thus classed as debts by simple contract, founded on the peculiar forms of the Common Law actions, by which they may be enforced. A bill in equity, to enforce a demand against the assets of a deceased debtor or trustee, is not in the

(a) Sir Wm. Jones's Rep. 450.

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nature of an action of debt—it is a bill to administer a trust, to call the party in possession of property bound by that trust to account for its application, and to make him or his assets responsible for the misapplication of it. The prayer of such a bill is almost uniformly, that an account should be taken of the fund and of its application; and the forms of procedure at Common Law, to which it bears the nearest resemblance, are those of an action of account, or an action on the case, or assumpsit, for a breach of duty. In fact one of the instances in which the action of account is maintainable at Common Law, that of heir against guardian, is one which, in this Court, is treated as a case of direct trust.

The converse of this proposition, as to the resemblance of a bill for such purposes to an action of account, is stated by Tyndal, C. J., in the case of *Cottram v. Partridge* (a), where he says:—"The action of account is more like a bill in equity for enforcing the execution of a trust, than an ordinary action;" and the action of account is one to which the bar of the Statute of Limitations expressly applies, and is barred by that statute if not brought within six years. Such, I apprehend, would be the nature and character of a bill in equity by the *cestui que trust* against the trustee himself, as by the petitioner here against William Henry Hutchinson, if he were now living, calling on him to perform the trusts of the will of Thomas Hutchinson, or to account for estates come to his hands bound by those trusts. In that suit, the peculiar doctrines of this Court, as regulating the relation of trustee and *cestui que trust*, would not permit him to set up the bar of the Statute of Limitations; but it is admitted now, that on his death, that personal and express trust ceased, and that as between the petitioners and respondents—who merely represent his assets, and not the estate bound by the trust—no such relation exists, and that their conscience is not bound by any equity to prevent them relying on the Statute of Limitations against any demand made on the general assets of their testator. So far then, as regards the language of the Statute of Limitations respecting actions of debt, I am clearly of opinion it has no bearing on

(a) 4 M. & G. 285.

this question; and that, if there were no other foundation for the order, from the reversal of which the petitioners have appealed, than that which is to be found in the argument deduced from that language, that order could not be supported. In support of his views on this subject, the Master of the Rolls states it as his opinion, that the plaintiff's bond, if a debt at all, was *debitum ex delicto*. No doubt, at law a demand, founded on a devastavit by an executor or administrator, is regarded as a debt *ex delicto*; and so, if in any form of action at law, this debt could be sued for, it would probably be regarded in the same light. But this is a consideration wholly disregarded in such cases in a Court of Equity: at law, such a demand would die with the person, as was the case in regard to a devastavit by an executor or administrator, before the passing of the statute 7 W. 3, c. 6, s. 11; and if it were held that the demand here was one arising *ex delicto*, as against William Henry Hutchinson, and that this Court took notice of it only in that light, the consequence might be, that we would perhaps be discussing, not the question of whether it is or is not barred by the Statute of Limitations, by reason of the time which has elapsed since the death of William Henry Hutchinson, but whether it is a demand which could be enforced against his executors at all, or was within the exceptions which at law have been engrafted on the maxim that *actio personalis moritur cum persona*. But this consideration, as I have said, is not in cases of administration regarded, in a Court of Equity: relief is given here, not on the ground that the demand is one arising *ex delicto*, but notwithstanding and in spite of that Common Law doctrine. Before the statute I have alluded to, this was the rule of Courts of Equity. I will refer but to one of the older authorities upon the subject, that of an *Anonymous case* (a), referred to in *Bac. Abr.* (b); that was an action brought against the executor of an executor *de son tort*, who had possessed himself of the goods of the deceased debtor, and it was held on error in the Exchequer Chamber, before the Lord Chancellor, Lord Treasurer and two Chief Justices, that the action did not lie at law; but the Lord Chancellor said he

1853.  
*Chancery.*  
BBERETON  
v.  
HUTCHINSON.  
*Judgment.*

(a) 2 Mod. 293.

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(b) Vol. 3, p. 99.

1853.  
*Chancery.*  
 BREERETON  
 v.  
 HUTCHINSON.  
*Judgment.*

would help the plaintiff in Equity. The whole doctrine of the Court is, however, fully discussed, and I may say exhausted, in the judgment of Lord Redesdale, in the case of *Adair v. Shaw* (a); and I cannot better close this branch of the case than by reading some passages from that judgment, which show the grounds on which this Court proceeds in cases where the demand arising *ex delicto* could not be maintained at law:—"But it is objected, that a Court of Equity cannot alter the principles which govern in a Court of Law, and that if a person is not chargeable by the Common Law, he is not chargeable in a Court of Equity. That is going too far; for that position would put an end to all executions of trust, and to all proceedings founded on a breach of trust—matters which are not cognisable at law, but are cognisable in equity. The only thing to be inquired in a Court of Equity is, whether the property bound by the trust has come to the hands of the persons who were either bound to execute the trust, or to preserve the property for the persons entitled to it; and the whole jurisdiction of Courts of Equity in the administration of assets is founded on the principle, that it is the duty of the Court to enforce the execution of trusts, and that the executor or administrator who has the property in his hands is bound to apply that property in the payment of debts and legacies, and to apply the surplus according to the will—or in case of intestacy, according to the Statute of Distributions, the sole ground on which Courts of Equity proceed in cases of this kind is *the execution of a trust*; and if we advert to the cases on the subject, we shall find that trusts are enforced not only against those persons who rightfully are possessed of the trust property as trustees, but also against all persons who come into possession of the property, bound by the trust, with notice of the trust, and whoever so comes into possession is considered as bound, with respect to that special property, to the execution of the trust." He then discussed the cases in Courts of Common Law, where, if "the effect of the act done was to put into the hands of one party something belonging to the other, which was of value, although the most beneficial action die with the

(a) 1 Sch. & Lef. 243; *vide* 261.

person, because founded on a tort, yet the action by which the value of the thing itself might be recovered would remain." And he shows conclusively, that this principle has nothing to do with the administration of assets in Courts of Equity.

1853.  
*Chancery.*  
BREKTON  
v.  
HUTCHINSON.  
*Judgment.*

It is then, I think, clear, that it is by force of its own peculiar doctrines, in cases of trust, both as regards the origin of the demand, and the liability of the assets of the deceased, that in cases such as this relief is given in a Court of Equity—relief to the party injured by the breach of trust, against the assets of the deceased and defaulting trustee—a relief, founded on the actual or constructive possession, by the latter, of property bound by the trust, and for the application of which he is liable to account; and this relief is given on these principles, not only in cases where a pecuniary benefit has resulted to the trustee himself, from this breach of trust, but in cases which are sometimes of great hardship, where no such benefit has resulted to him, as where one trustee is held responsible for the acts of another, a liability which is held to affect his assets; such as was the case of *Scholefield v. Howes* (reported 3 *Bro.*, *C. C.*, p. 92), but more correctly stated from Lord Colchester's notes, in the note 8, at page 94, thus going beyond the cases which, at law, had been decided as exceptions from the doctrine applicable to actions *ex delicto*, which are referred to by Lord Redesdale, in the case of *Adair v. Shaw*. It is a branch of this doctrine, as to the relief to be given in a Court of Equity in such cases, now abundantly established, that unless in cases of trust, created by specialty, the liability of a deceased trustee, who has committed a breach of trust, ranks against his assets but as a demand by simple contract; and the case of *Doran v. Dunne* decided, that as such it is subject to the rules on which a Court of Equity acts in analogy to the Statute of Limitations, and is barred by the lapse of six years from the death of the trustee, before the initiation of the suit. No authority has been cited, where distinctions have been taken as between any other species of debts by simple contracts, in such cases of the administration of assets, founded on the nature of the demand, and giving to any one class the benefit of an exclusion.

1853.  
*Chancery.*  
 BRERETON  
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*Judgment.*

from the general rule; and I believe the case of *Dunne v. Doran* is the only one, either here or in England, in which the proposition, as respects demands founded on breaches of trust, has been pointedly affirmed or clearly raised. Some cases were relied on by Counsel for the petitioners, as supporting this view of the case; but on examination of them, I do not think they amount to authorities of any weight: one is the case of *Baker v. Hunter* (a). That was brought before the Court by the new assignees of a bankrupt, against the representatives of the former assignees. The facts were, that under a commission, dated the 26th of July 1806, James Baker and Randle Hopley were chosen assignees; the usual assignment was made to them on the 26th of August 1806, by which they covenanted to account for and pay all moneys which they might receive from the estate of the bankrupts. On the 18th of August 1811, Baker, the acting assignee, exhibited his account, claiming credit for items to the amount of £2723, which the Commissioners refused to allow, until submitted to a meeting of creditors for their approbation. Baker died in July 1822, having appointed his sons William and John, and Charles Martin, his executors. No meeting of the creditors was called, and the £2723 remained disallowed. In 1828, Vachell was appointed assignee in Baker's place, and the estate assigned to him and Hopley. In 1830, Hopley and Vachell filed a bill against the representatives of Baker, to recover the balance due to the estate of the bankrupts. William and John Baker stated by their answer, that they had before notice of this claim divided the whole of their father's estate amongst the persons entitled under his will, except £5872, which in 1829 they had transferred to the cause of *Baker v. Martin*. The usual administration accounts were directed in that cause, by a decree of the 5th of May 1830. Vachell died in 1830; Mure was chosen assignee, and on the 17th of January 1832, a charge was carried in before the Master on his behalf, claiming to be admitted as a creditor under the decree in *Baker v. Martin*, for the £2723. The Master declined to proceed on the charge, on the ground that he had no authority

(a) 5 Sim. 380.

to take the accounts of James Baker, as assignee, under the decree; and the motion was for a direction to proceed on that charge.

Now, the only part of that case which was relied on is the observation of the Vice-Chancellor, when he says, "The testator was in the situation of a trustee for the creditors of the bankrupts. How, then, can the lapse of time, either in his lifetime or since his death, affect the debt?" But as applicable to the facts of the case, such an observation was wholly unnecessary; and it was not on any such ground that the Court relied. There the debt was plainly a specialty debt; and the defendants, in an answer to a bill of the assignees, instituted in 1830, had, it would seem, admitted the liability, but relied on a distribution of the assets, before notice of the claim, and referred the parties to the case of *Baker v. Martin*. Another case referred to on this general question was that of *Dickenson v. Lord Holland* (a). In that case, "Under a trust deed, dated in 1806, and which was to operate during the life of the grantor, the trustee, after the performance of certain trusts, was to pay the surplus rents to the owner during his life. The owner died in 1816; the trustee died in 1818; and in 1828, a bill for an account was filed by the representatives of the former against the representatives of the latter. The answer was filed in the following year, but no further proceedings were taken in the suit until 1839, when the cause was set down, and was heard in 1840. It was there held that no such laches existed as to bar the account."

The question there raised is not on the Statute of Limitations, which is not relied on in the answer, but on the lapse of time; which, however, is met by the fact that the suit had been instituted in 1828; and the Court decided the case as if the cause had then been brought to a hearing. It is, besides, a case of a trust created by deed.

The case of *The Attorney General v. Higham* (b) was adverted to by me, as one in which this question had been raised by a personal representative; it is, however, distinguishable, on the

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Chancery.  
BREKTON  
v.  
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Judgment.

(a) 2 Beav. 310.

(b) 2 Y. & C. C. 634.

1853.  
*Chancery.*  
 BREBENTON  
 v.  
 HUTCHINSON.  
 —  
*Judgment.*

ground that the suit was by the Attorney-General, to enforce a charitable trust, and therefore within the doctrine that the Statutes of Limitations do not bind the Crown; and this appears to have been the view taken of the defence by the Vice-Chancellor. I may also observe, of the cases of *Baker v. Martin*, and *Dickenson v. Holland*, that they were suits involving accounts respecting property which might be shown in the course of the administration to have specifically come into the hands of the defendants, the personal representatives of the deceased trustees, and as to which the defendants would in that case be held directly responsible; and the same observation is somewhat applicable to the case of *The Attorney-General v. Higham*, which was principally conversant about a specific fund, secured by a promissory note. No such observations can be applied to the present case, or to that of *Dunne v. Doran*. This suit is founded on a total alienation, made without any pecuniary consideration by the deceased trustee in his lifetime, and is therefore merely for a simple money demand, arising out of that breach of trust, in respect of which no fund specifically bound by it could by any possibility have come to the hands of the respondents. The case of *Dunne v. Doran* was likewise of the same character, and not conversant about any specific estate upon which a trust could have been attached in the hands of the devisees, in connection with the devastavit, out of which the demand arose.

In the absence, then, of any decision to the contrary, and being of opinion that in the judgment of the Master of the Rolls, for the reasons I have stated, no sufficient grounds are shown for an opposite conclusion, I feel that I must abide by the decision of the Court of Exchequer, in *Dunne v. Doran*, in which the point in question here was distinctly raised and decided.

I mentioned, at the close of the argument of this case, that I would take an opportunity of ascertaining the views of the Barons of the Exchequer, who had concurred with me in that decision, before pronouncing judgment. In consequence of the illness of Baron Pennefather, I have not submitted the matter to that learned Judge, but I have communicated with the Lord Chief Justice, and with Baron Richards, to each of whom I transmitted a copy of the

judgment of the Master of the Rolls, and they have informed me that, in their opinion, the case of *Dunne v. Doran* was rightly decided. Under these circumstances, I feel that until some higher authority shall otherwise decide, I ought to abide by the decision pronounced in that case; and therefore, though expressing, as I have done, my opinion, against the views entertained by the Master of the Rolls, I must affirm his order, but without costs.

1854.  
*Chancery.*  
BREBETON  
v.  
HUTCHINSON.  
*Judgment.*

In re HACKETT, a Lunatic.

*May 6.*

Mr. H. H. HAMILTON moved, on behalf of the committees of the lunatic, that they should be at liberty to take the lunatic to travel in England and on the Continent. He relied on a certificate of Sir Henry Marsh and Dr. Price, that it was "advisable that she should have the advantage of frequent changes of air and scene, and that it would be to her advantage to travel, and remain for a time in Continental climate:" *In re Stair* (a).

A lunatic may be permitted to travel in England, on proper security being given, but the Court will not give leave to the committee to take the lunatic out of the United Kingdom, on a medical certificate that it would be to the advantage of the lunatic to travel in a Continental climate.

The LORD CHANCELLOR made the order, allowing the lunatic to be taken out of the jurisdiction, but refusing permission to have her taken out of the United Kingdom.

(a) 1 C. P. Coop. 227.

1854.  
Rolls.

HONORIA O'CALLAGHAN, . . . *Petitioner ;*  
JOHN O'CALLAGHAN, . . . . *Respondent.*

MARY O'CALLAGHAN, . . . . *Petitioner ;*  
SAME, . . . . . *Respondent.*

(*In the Rolls.*)

Jan. 17, 80.

A sum was received by a respondent from the tenants subsequently to the appointment of a receiver, by a puisne creditor. The receiver, in his account, was charged with the sum as received by him, and a conditional order for an attachment was obtained against the respondent, before the extension of the receiver, by a prior creditor.—*Held*, that as the tenants paid the sum prior to the extending order, it was to be considered as a sum paid by the tenants for the receiver, and that the petitioner in the first matter was entitled to it.

THE receiver was appointed in the first matter on the 6th of February 1851, and extended to the second matter by a prior creditor on the 15th of November 1852. After the appointment of the receiver, but before the extension, the respondent received from the tenants a sum of £47. 9s. 9d., for which a conditional order for an attachment had been obtained against him. A sum of £78 being in the receiver's hands, the petitioner in the second matter moved that it should be paid to her. The petitioner in the first matter moved a cross notice, that a sum of £45 should be retained by the receiver, to pay the costs of his appointment in the first matter, and that the residue should be paid to the petitioner in the first matter, in part discharge of the said sum of £47. 9s. 9d.

There were some other circumstances connected with the receipt of that sum by the respondent, which are stated in his Honour's judgment.

Mr. Coffey, for the original motion.

Mr. Hughes, for the cross motion.

The question discussed was whether, according to *Abbott v. Stratton (a)*, the petitioner in the first matter, or the petitioner in the second matter, was entitled to the £47. 9s. 9d.

(a) 2 Jon. & Lat. 613; S. C. 9 Ir. Eq. Rep. 233.

The MASTER OF THE ROLLS.

1854.  
Rolls.  
O'CALLAGHAN  
v.  
O'CALLAGHAN  
Jan. 30.  
Judgment.

A motion has been made by the petitioner in the second matter, that the balance in the receiver's hands, amounting to £78, should be paid over to her. The petitioner in the first matter has served a cross-notice, that a sum of £45 be retained by the receiver to pay the costs of appointing the receiver in the first matter, when the same shall be taxed; and that the residue in the receiver's hands shall be paid to the petitioner in the first matter, in part discharge of the sum of £47. 7s. 9d., which was received by the respondent prior to the extension of the receiver to the second matter. The facts of the case are as follow:—On the 6th of February 1851, a decretal order was made in the first matter, for the appointment of a receiver, to pay the arrears of jointure due to Honoria O'Callaghan, the petitioner in the first matter. On the 15th of November 1852, the receiver was extended to the second matter, by a decretal order of the Master, bearing date on that day. The annuity payable to the petitioner in the second matter has priority over the jointure in the first matter.

The order of the 6th of February 1851, appointing the receiver in the first matter, attached the rent due in September 1850; and all rents to be received by the receiver, or for him, prior to the extending order of the 15th of November 1852, were properly payable to the petitioner in the first matter; and all rents received by the receiver from the tenants, subsequently to such extending order, were, except so far as a claim might be made thereout, for the costs of appointing the receiver in the first matter, payable to the petitioner in the second matter.

It appears that the respondent, between the 6th of February 1851 (the date of the appointment of the receiver in the first matter), and the month of July in that year, improperly received from the tenants £47. 7s. 9d. In June 1852, the receiver passed an account, and the petitioner in the first matter, seeking to charge the receiver with the said rents received by the respondent, the Master passed the account, without prejudice to charging the receiver with that sum of £47. 7s. 9d., received by the respondent.

On the 9th of November 1852, a conditional order for an attach-

1854.  
*Rolls.*  
 O'CALLAGHAN  
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 O'CALLAGHAN  
*Judgment.*

ment was obtained against the respondent, for having received said rents; and on the 15th of November 1852, the receiver was extended to the second matter, the conditional order not having then been made absolute. The receiver charged himself in his next account with the said sum of £47. 7s. 9d., never having, in fact, received it; but he took credit for the payment of said sum to the petitioner in the second matter, who passed a receipt for same in December 1852, although, in fact, the sum was not paid to her. The petitioner in the second matter is, I believe, the mother of the respondent; and by passing such receipt, it was sought to arrange the contempt.

The question is, whether the said sum is to be considered as received by the receiver subsequently to the order of the 15th of November 1852, extending the receiver, and consequently payable to the petitioner in the second matter, on the authority of *Abbott v. Stratton* (a); or whether,—as the sum was paid by the tenants to the respondent prior to the extending order, and as such sum was improperly received by the respondent, and was a payment in effect for the receiver—it is to be considered as a sum received by or for the receiver, prior to the extending order.

There is some difficulty in the question; but on the whole I am of opinion that, as the tenants paid the said sum for rent prior to the extending order, it is to be considered as a sum paid to the respondent for the receiver, the Court having compelled the respondent to account for it to the receiver; and that the mere fact of its not having been actually paid over to the receiver, prior to the extending order, makes no difference, as the respondent improperly received it from the tenants, and was liable to the receiver, and held the sum so received for the use of the receiver, prior to the extending order. This appears to be quite consistent with the doctrine of *Abbott v. Stratton*.

It appears to me, therefore, that the £47. 7s. 9d. is properly payable to the petitioner in the first matter; and I shall make the order accordingly.

(a) *Ubi supra.*

1854.  
Rolls.

In the Matter of SYNGE'S TRUSTS.

Jan. 18, 19.  
April 16.

THE petition in this case was presented under the Trustee Relief Act, 11 & 12 of *The Queen*, c. 68, by Samuel Dawson Hutcheson Loyd Vaughan, Esq. The question which arose was the construction to be put on the will of Elizabeth Synge, and on the 7th and 12th codicils thereto, so far as they related to the bequest of a sum of £1000, late currency, to one Martha Vaughan.

The will of Elizabeth Synge bore date the 21st of May 1816, and the testatrix thereby, after a bequest to her niece Mary Vaughan of £1000, stated:—"I give and devise to Martha Vaughan (her sister) the sum of £1000."

The 7th codicil to the will was as follows:—"My codicil, this 13th day of May 1819.—Being, I thank God, in good health and sound mind, as I see no sign or likelihood of my niece Martha Vaughan being married, and time is going fast over her head, I left her £1000 in my will; if she should be married and not leave children or child alive, that said £1000, left her in my will, is to become the property of my two nephews, Edward Synge, of Glenmore, and Francis Synge;" and after describing her nephews, and where they resided, the codicil proceeded, "£500 to each of the above-named, after the death of my niece Martha Vaughan; but if the said Martha Vaughan should ever marry, and leave a child alive, or children—in that case, she can leave the said £1000, as she thinks proper, to one or amongst any children she may have." The rest of the codicil was not material to the question which arose.

The 12th codicil commenced thus:—"Though my will and codicils are still in Lady Hutcheson's store-room, in Harcourt-street, so many accidents happen, that I think it right to write this sketch of my will and codicils, that when it pleases God I die, that those

absolute one to M. V., with an executory bequest over to E. S. and F. S., if she should die without leaving issue living at her death, whether children or remoter issue, which, in the events which had happened, had failed.

A sum of £1000 was left by a will to M. V. By a codicil, if M. V. should be married, and not leave children or child alive, the £1000, left by the will, was to become the property of E. S. & F. S., but if M. V. "should ever marry, and leave a child alive, or children, in that case she can leave the said £1000 as she thinks proper, to one or amongst any children she may have." By a further codicil, the £1000 was left "to M. V.; but if she died without children, it was to become the property of E. S. & F. S." M. V. married, and died, leaving no child, but leaving a grandchild, the son of a deceased daughter, to whom she had appointed the £1000 on her marriage.—*Held*, that the bequest was an

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*Rolls.*

*In re*  
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TRUSTS.

*Statement.*

I have left my substance to may not be at a loss where to find them. I have left," &c. The testatrix stated some of the bequests in her will; and then the 12th codicil proceeded thus:—"I leave to my niece Martha Vaughan £1000; but if she dies without children, it is to become the property of, £500 to my nephew Edward Synge, junior, of Glenmore Castle (John Synge's brother), and the other £500 of the £1000 is to become the property of Francis Synge the younger, and son of my nephew George Synge, of Rathmore."

The testatrix, Elizabeth Synge, died on or about the 15th of August 1834, having added other codicils to her will; but they did not affect the question in the case. Martha Vaughan married John Loyd, Esq., on or about the 25th of May 1822, in the lifetime of the testatrix, but after the execution of the will and codicils. There were two children of the marriage, one who died an infant in his father's lifetime, and the second, a daughter, Mary Loyd. John Loyd died in 1842, leaving his wife and daughter him surviving, having first made his will; but no question arose on his will.

The petitioner married Mary Loyd, on the 12th of August 1843, and Martha Loyd otherwise Vaughan, her mother, executed a deed, on the 11th of August, appointing the sum of £931. 14s. 3d., Government £3½ per cent. stock (in which the legacy of £1000, late currency, bequeathed by Elizabeth Synge to Martha Loyd otherwise Vaughan, had been invested), to her daughter Mary Loyd; and by a settlement, executed on the following day, and previous to the marriage, the said stock was vested in trustees, on trust, after the death of the said Martha Loyd otherwise Vaughan, to pay the dividends to said Mary Loyd for life; and after her decease, to the petitioner for life; and after the decease of the survivor, the said Government stock was to be held in trust for the children of the marriage, as in said settlement provided.

Mary Loyd died on the 31st of January 1845, leaving one child, a son, and leaving the petitioner and her mother Martha Loyd her surviving. Martha Loyd otherwise Vaughan died on the 26th of January 1849, having thus survived her daughter some years, and

leaving the only child of Mary Loyd and the petitioner her grandson, and only next-of-kin.

The trustee, in whose name the Government stock was invested, having lodged the fund in Court, under the Trustee Relief Act, the question which arose on the will and codicils of Elizabeth Synge was, whether Martha Loyd otherwise Vaughan, having survived her daughter Mary Loyd, and having therefore died without leaving any children or child, but having left a grandchild (the son of her daughter Mary) her surviving, the bequest over in the 7th and 12th codicils to Edward and Francis Synge had taken effect?

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Rolls.  
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SYNGE'S  
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Statement.

Mr. *F. Fitzgerald* and Mr. *Robert R. Warren*, for the petitioner, contended that the words, "child or children," in the 7th and 12th codicils, must be construed to mean "issue;" and then the true construction of the will and codicils would be an absolute gift of the £1000 to Martha Vaughan, with an executory bequest over on failure of "issue," generally (in which case the bequest over would be void), or, on failure of issue living at the death of Martha Vaughan, an event which had not happened. *Quacunque via*, the petitioner was entitled to the dividends. They cited *Wild's case* (a); *Stokes v. Heron* (b); *Scott v. Scott* (c); *Read v. Willis* (d); *Doe v. Webber* (e); *Doe v. Simpson* (f); *Hughes v. Sayer* (g); *Pope v. Pope* (h); *King v. Melling* (i); *Ragget v. Beatty* (k).

Argument.

Mr. *Martley* and Mr. *Synge*, for Edward and Thomas Synge, argued that the gift was to Martha Vaughan for life, with a power of appointment to her children living at her death; or with a gift over to her children living at her death, as purchasers. In either view, the grandson of Martha Vaughan was not entitled to the principal, nor the petitioner to the dividends; for under a power to

(a) 6 Rep. 16 a.

(c) 15 Sim. 47.

(e) 1 B. & Ald. 713.

(g) 1 P. Wms. 532.

(i) 1 Vent. 231.

(b) 12 Cl. & Fin. 161.

(d) 1 Coll. 86.

(f) 3 Man. & Gr. 929.

(h) 14 Beav. 591.

(k) 2 Moo. & P. 512.

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*Rolls.*  
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appoint to children, an appointment could not be made in favour of grandchildren, and under a devise to children, grandchildren could not take: *Read v. Willis* (a); *Gawler v. Cudly* (b); *Buffar v. Bradford* (c); *Radcliff v. Binckley* (d); *Lord Orford v. Churchill* (e); *Sanderson v. Bayley* (f); *Stone v. Maule* (g); *Forth v. Chapman* (h); *Campbell v. Harding* (i); *Tooney v. Basset* (k); *Fitch v. Friend* (l); *Moor v. Raisbeck* (m); *Needham v. Smith* (n).

The MASTER OF THE ROLLS, after stating the facts, said:—

April 16.  
 Judgment.

If this case be considered without reference to authority, there can be but little doubt of the intention of the testatrix. She bequeathed by her will, dated May 1816, £1000 to her niece Martha Vaughan. The bequest was an absolute bequest. In May 1819, the 7th codicil was executed. It appears, from the recital in that codicil, that the testatrix thought there was no likelihood of her niece, the said Martha Vaughan, being married, or that, if married, she should have children—"time going fast over her head"—and on that account, she bequeathed the £1000 to her nephews Edward Syngé and Francis Syngé, if her said niece Martha "should be married, and not leave any children or child alive;" and in a subsequent part of the 7th codicil, it is provided, that "if the said Martha should ever marry, and leave a child alive, or children, in that case, she can leave the £1000, as she thinks proper, to one or amongst any children she may have." The gift over to Edward and Francis Syngé by the 12th codicil is, "if she (Martha Vaughan) dies without children."

The testatrix, therefore, made the bequest over to her nephews, cutting down the absolute bequest contained in the will, on the assumption that probably Martha never would marry, or if she

(a) 1 Coll. 86.

(c) 2 Atk. 220.

(e) 3 Ves. & B. 59.

(g) 2 Sim. 490.

(i) 2 Russ. & M. 402.

(l) 2 De Gex & Sm. 405.

(b) Jac. 346.

(d) 10 Ves. 195.

(f) 4 M. & Cr. 56.

(h) 1 P. Wms. 663.

(k) 10 East, 480.

(m) 12 Sim. 123.

(n) 4 Russ. 318.

did marry, would leave no children. But there can be little doubt that the testatrix never contemplated cutting down the absolute bequest to her niece Martha, and giving the £1000 over to her nephews, in the event, which has happened, of her niece Martha Vaughan marrying and having a child, which child, Mary Loyd, died in the lifetime of Martha Vaughan, leaving a son.

If a literal construction be put on the 7th and 12th codicils, Martha Vaughan has, no doubt, died without leaving a child or children; but she has left issue, namely, the son of her daughter, and the question is, whether the bequest over took effect, to the exclusion of the grandchild of Martha Vaughan?

I shall first consider the legal construction which should be put on the will, and the 7th codicil, without reference to the 12th codicil. I am of opinion that the effect of the will and the 7th codicil was, that there was an absolute bequest of the £1000 to Martha Vaughan, with an executory bequest to the nephews of the testatrix, if Martha Vaughan should die without leaving issue living at her death, whether the issue were children or remoter issue.

There is no decision relating to a bequest of personal estate, exactly applicable to the present case, but the observations of Lord Ellenborough, in the case of *Doe v. Webber (a)*, appear to me to bear strongly on the present case. In that case the testator devised certain lands to Mary Hiles and her heirs for ever, and in case Mary Hiles should happen to die, and leave no child or children, then to Jane Barnes and her heirs, she paying £1000 to the executor of Mary Hiles, or to such persons as Mary Hiles should by will appoint. It was decided that the words, "child or children," were in that case synonymous with "issue," and that an estate in fee was devised to Mary Hiles, with an executory devise over to Jane Barnes, in the event of Mary Hiles dying without leaving issue living at her death. Lord Ellenborough, in giving judgment, said:—"Where the intent requires it, the word 'children' has not been confined to immediate descendants;" and Lord Ellenborough,

(a) B. & Ald. 720.

1854.  
Rolls.  
In re  
SYNGE'S  
TRUSTS.  
Judgment.

1854.  
Rolls.  
In re  
SYNGE'S  
TRUSTS.  
Judgment.

after referring to some of the authorities, adds, "In the present case the words 'child or children' must be construed to mean issue, because it is the manifest intention of the testatrix that Jane Barnes should not take by the devise over, in exclusion of any of the issue, however remote, of Mary Hiles; and unless the words do receive that construction, Jane Barnes would take in exclusion of such issue, in the event of Mary Hiles dying without leaving at her death any son or daughter surviving her, but leaving a grandchild or grandchildren, the offspring of any of her own deceased immediate children."

In that case the terms of the will were, "leave no child or children," and the latter words being construed "issue," the word "leave" would have implied an indefinite failure of issue (the property devised being real estate), if there had not been language in the will to show that the leaving no issue was to be confined to Mary Hiles leaving no issue living at her death. In the present case, the terms "if she should be married, and not leave any children or child alive," would, independently of the context, be confined to the leaving issue at the death of Martha Vaughan, the property being personal estate: *Forth v. Chapman* (a).

The case of *Doe v. Webber* has been recognised in the case of *Doe v. Simpson* (b). That was a case of copyhold lands which could not be entailed, but Lord Denman, in giving judgment in the Court of Exchequer Chamber, said, "In *Doe* dem. *Smith v. Webber*, Lord Ellenborough, in giving judgment, stated that the words 'child or children' must, in that case, mean 'issue,' for a reason which is easily applicable to the case now before us, namely, that upon any other construction the grandchildren of the devisee would be excluded, in the not improbable event of his leaving grandchildren, but surviving all his children. It is true that the decision in that case did not necessarily require such a construction, so that the case cannot be treated absolutely as an authority in point; still, the opinion of the Court of King's Bench, pronounced after deliberation, is certainly entitled to very great attention; and the extreme improbability that the testator, in

(a) P. Wms. 663.

(b) 3 Man. & Gr. 953.

the case before us could have meant, upon the mere accident of his leaving no grandchildren living at the death of his son, capriciously to disinherit his remote issue, seems of itself a very strong ground for construing the word 'children' in the sense of 'issue' generally."

In the present case, the Court is called upon to suppose that the testatrix intended that the £1000 absolutely bequeathed to Martha Vaughan, by her will, was, under the terms of the 7th codicil, to go over to the nephews of the testatrix, her niece Martha Vaughan having died without leaving any child surviving her, but having left a grandchild. The observations of Lord Ellenborough and Lord Denman appear to warrant me in construing the words "child or children" as "issue," and I am of opinion that the effect of the will and 7th codicil was what I have stated, namely, that the testatrix bequeathed £1000, late currency, to Martha Vaughan, with an executory bequest over, in the event of her dying without leaving issue living at her death; and that as she left issue living at her death, viz., a grandson, the child of her only daughter, Mary Loyd, the bequest over has failed, and consequently the petitioner, the husband of Mary Loyd deceased, is entitled, under his marriage settlement, to the dividends of the fund in Court (which represents the £1000 late currency) for his life, and his son by Mary Loyd will be entitled to the principal of the fund in Court, on the death of his father.

The cases to which I have referred appear to me to apply more strongly to the 12th codicil; and the death "without children," in that codicil, means either a death without issue generally, in which case the bequest over was void, or if it is to be construed in connection with the 7th codicil, it means the death of Martha Vaughan without issue living at her death, an event which has not taken place, she having left a grandson.

With respect to the cases which have been referred to on the part of Edward and Francis Synge, they do not appear to me to conflict with the authorities to which I have referred. In the case of *Hughes v. Sayer* (a), the testator bequeathed a legacy to Paul and Anne Hughes, and upon either of them dying without children, to

1854.  
Rolls.  
In re  
SYNGE'S  
TRUSTS.  
Judgment.

(a) 1 P. Wms. 534.

1854.  
Rolls.  
In re  
SYNGE'S  
TRUSTS.  
Judgment.

the survivor. It was held, that "The words 'dying without children' must be taken to be children living at the death of the party; for that it could not be taken in the other sense, that is, whenever there should be a failure of issue; because the immediate limitation over was to the surviving devisee, and it was not probable that, if either of the devisees should die leaving issue, the survivor should live so long as to see a failure of issue, which, in notion of law, was such a limitation as might endure for ever; and therefore, by reason of the limitation over, in case of either devisee dying without children, then to the survivor, the testator must be intended to mean a dying without children, living at the death of the parent; consequently the devise over was good."

Now it was not decided in that case, that if either of the devisees had died without a child leaving a grandchild, the survivor would have taken. All that was decided was, that the devise to the survivor was not after an indefinite failure of issue.

Several cases have been cited to show that under a devise to children, grandchildren will not in general take; and that under a power to appoint to children, there cannot be an appointment to grandchildren. I am of opinion, however, that these authorities have no application to the question which arises in the present case.

The bequest over not having taken effect, the petitioner will be entitled to the dividends on the Government stock for his life, under the marriage settlement of the 12th of August 1843, and his minor son will be entitled to the principal of the Government stock, on the death of the petitioner, under the provisions of the said settlement. I do not think I am called on to transfer the Government stock to the trustees in the settlement of the 12th of August 1843, as sought by the notice, no reason having been stated to the Court why it should be transferred to them. I made and sent in the following order after the rising of the Court last Sittings:—

The Court doth declare, that Martha Loyd, otherwise Vaughan, having left a grandson living at her death (the only child of the petitioner and of Mary Loyd, which Mary Loyd was

the only child of the said Martha), the executory bequest over to Edward Synge and Francis Synge, by the 7th and 12th codicils to the will of Elizabeth Synge, did not take effect; and it is further ordered that the Accountant General do transfer the Government  $\text{£}3\frac{1}{2}$  per cent. stock, standing to the credit of this matter, to a separate credit in this matter, to be entitled, "sum transferred to the separate credit of the trustees of the marriage settlement, bearing date the 12th of August 1843, executed on the marriage of S. D. H. Loyd Vaughan with Mary Loyd." And it is further ordered, that the Accountant-General do draw on the Bank of Ireland in favour of the petitioner, or of his attorney, thereto lawfully authorised, for the dividends now due, or hereafter to grow due, on the said Government stock, or on such amount of stock as shall stand to the said separate credit, after payment of the costs hereinafter mentioned. And it is further ordered and declared, that the petitioner is entitled to the costs of this petition and order, and of the said transfer, out of the said Government stock so to be transferred to such separate credit, and refer it to the Taxing-master to tax said costs, as solicitor and client's costs are taxed against a fund, and having regard to the petitioner's minor son being entitled to the capital of the stock after his father's death. And it is further ordered, that the Accountant-General do transfer so much of the said Government stock to the said petitioner, or to his solicitor, Mr. John Orpen, as at the price of the day, with the approbation of the Master, will be equivalent to said costs, when taxed and certified. And let the said Edward Synge and Francis Synge abide their own costs of appearing on this petition and motion.

1854.

*Rolls.*

*In re*  
SYNGE'S  
TRUSTS.

*Order.*

1854.  
Rolls.

## BALDWIN v. BALDWIN.

April 25, 29.

Cross demands arising in different rights cannot be made the subject of set-off.

The Court will not, without evidence, and from the mere non-payment of any sum by either party, presume an agreement that one demand should be set off against another.

A was tenant for life of an estate on which B had a charge; B was indebted to A by judgment, and in a sum for contribution. No interest was paid by A to B from 1838, for ten years, during which time A continued in possession of the estate, nor was any sum paid by B to A during that time.

Held, after the death of both, first that there could be no set-off of

one demand against the others, as A was not personally liable, for the interest and the demands were of a different nature.

Secondly, that the Court would not, in the absence of direct evidence, presume an agreement for a set-off.

THIS was an appeal from a decretal order of the Master, made in a matter referred to him, under the 15th section of the Court of Chancery (Ireland) Regulation Act, 1850. The facts of the case, and the arguments urged, appear sufficiently from the judgment.

Mr. Hughes and Mr. Robert R. Warren, for the petitioner.

Mr. Deasy and Mr. J. S. Townsend, for Barbara Morris Baldwin.

*Pettat v. Ellis* (a); *Bertie v. Lord Abingdon* (b); *Colthursts minors* (c); *Dillon v. Dillon* (d); were cited.

## THE MASTER OF THE ROLLS.

In this case a motion has been made on behalf of the petitioner, that the order of Edward Litton, Esq., the Master in this matter, bearing date the 18th of February 1854, may be varied, by expunging therefrom the declaration that, as between Henry Baldwin and Franklyn Baldwin, in the petition named, all their mutual claims are to go against one another, and that the account between them is to be considered as if stated and settled at the time of the death of said Henry Baldwin, and the further declaration that the respondent Barbara Morris Baldwin (executrix of Franklyn Baldwin) is entitled to have credit against all debts due from the said Franklyn Baldwin to the said Henry Baldwin at the time of his

(a) 9 Ves. 563.

(c) 5 Ir. Eq. Rep. 326.

(b) 3 Mer. 566.

(d) 6 Ir. Jur. 157.

death, for the sum of £470. 3s. 11d., the amount of interest then due to the said Franklyn Baldwin, on account of the charges affecting the estates of which the said Henry Baldwin was tenant for life, and mentioned in the further discharge, filed by the said Barbara Morris Baldwin, on the 9th of August 1853.

The relief sought by the rest of the notice is consequential on the question whether the declarations of the Master, which I have stated, can be sustained?

The petitioner is executor of Henry Baldwin, who died on the 20th of August 1848. The petition is for the administration of the real and personal estate of Franklyn Baldwin, deceased, who died in March 1849, the respondent Barbara being the personal representative of the said Franklyn Baldwin; and the respondent, William Baldwin the younger, being the son and heir-at-law of the said Franklyn. Henry Baldwin and Franklyn Baldwin were the sons of William Baldwin the elder, and entered into security to one Charles Porter, as sureties for their father, by a joint bond conditioned for the payment of £300 principal. William Baldwin, the father of Henry and Franklyn, died in 1838; and on the 6th of October 1840, Henry Baldwin paid the £300 to the said Charles Porter.

The first claim of the petitioner, as executor of Henry Baldwin, is to recover from the assets of his co-surety Franklyn Baldwin £150 (being the moiety of said £300), with interest from the said 6th of October 1840 to the 20th of August 1848, when the said Henry died. The remaining claim of the petitioner, as executor of Henry Baldwin, is on foot of a judgment entered as of Michaelmas Term 1844, by said Henry Baldwin, against Franklyn Baldwin, for £450, with interest thereon from that period to the said 28th of August 1848.

It thus appears that no interest was ever paid by Franklyn Baldwin to Henry Baldwin on foot of those claims, and the entire sum claimed, and reported as due thereon, is £762. 3s. 6d.

The first discharge filed by the respondent Barbara, the personal representative of the said Franklyn, was filed in April 1853, and no set-off was claimed by such discharge. On the 9th of August 1853, a further discharge was filed by her.

1854.  
Rolls. <sup>1</sup>  
BALDWIN  
v.  
BALDWIN.  
—  
Judgment.

1854.

*Rolls.*

BALDWIN

v.

BALDWIN.

*Judgment.*

The facts of the case appear to be as follow:—In the month of August 1792, a family settlement was executed, under which certain estates were settled on William Baldwin the elder, for life, remainder to his first and other sons in tail; and two sums of £3000 and £2000 were charged thereon, for the younger children of the marriage. A re-settlement was executed in 1823, under which William the elder was tenant for life, with remainder to the said Henry Baldwin for life, remainder to his first and other sons in tail, remainder to Franklyn Baldwin for life, with like remainder to his first and other sons; and by that deed one of the denominations (Tullyland) was to be sold, to pay off the £3000 and £2000, but although Tullyland thereby became the primary fund for payment, the other estates were not exonerated from the charges.

A contract for the sale of Tullyland having been entered into, a bill for a specific performance was filed, to enforce against the purchaser the performance of the contract; and a sale of Tullyland having been decreed, and an account of incumbrances directed, it is relied on by the petitioner, for the reasons I shall hereafter state, that the share of the charges vested in Franklyn Baldwin was reported due, with the entire interest thereon, from May 1838, at which time the charges became payable, on the death of William Baldwin the elder.

It is further relied on by the petitioner, for the reasons which I shall hereafter explain, that a suit was instituted on the 3rd of May 1852, by Frances Elizabeth Baldwin, against the said Barbara Morris Baldwin and William Baldwin, then the first tenant in tail of the lands charged with the said sums of £3000 and £2000, for a sale of same; and in that suit a charge was filed by Barbara Morris Baldwin, as the personal representative of Franklyn Baldwin, claiming the portion of said charges vested in the said Franklyn Baldwin, with the entire interest on such portion of the said charges from May 1838, when William Baldwin the elder died, and the charges became payable.

Now it will be recollected that Henry Baldwin was tenant for life of the lands charged with the £3000 and £2000, from May

1838 to his death on the 20th of August 1848, and as such tenant for life he was liable to keep down the interest on the said charges, and bound to pay his brother Franklyn the interest of those portions of the said charges vested in the said Franklyn. The amount then payable by Henry Baldwin to Franklyn Baldwin, from May 1838 to the 20th of August 1848 (when Henry Baldwin died), appears from the first schedule to the Master's order to have been £470. 3s. 11d.; and the discharge of Barbara Morris Baldwin, the personal representative of said Franklyn Baldwin, filed in August 1853, after stating the facts connected with the claim of Franklyn Baldwin, to receive said sum from said Henry in his lifetime, proceeds as follows:—

1854.  
*Rolls.*  
BALDWIN  
v.  
BALDWIN.  
*Judgment.*

“This dischargeant therefore submits that for said last mentioned sum (£470. 3s. 11d.), she is entitled to credit as against the demand of the petitioner, the said Rev. William Baldwin, as executor of Henry Baldwin: saith, the said Rev. William Baldwin was said Henry's land agent over said estates; and this dischargeant now confidently affirms that said Rev. William Baldwin will not on his oath deny that said last mentioned arrear of interest (i. e., £470. 3s. 11d.) remained and still remains unpaid, save so far as the demand of the said Rev. William Baldwin as such executor may have discharged the same.”

She then adds that there are no debts of Henry Baldwin remaining due and unpaid, except what are due to dischargeant.

Neither the declaration in the Master's order, nor that discharge, accurately raise the questions which have been argued, but the questions which arise are these: First, can Barbara Morris Baldwin set off the said sum of £470. 3s. 11d., interest, payable by Henry Baldwin to Franklyn Baldwin, against the claim of the petitioner, the executor of Henry, who was the creditor of Franklyn, on foot of the sum of £150 which I have mentioned, and on foot of the judgment of 1844, obtained by Henry Baldwin against said Franklyn Baldwin? Secondly, if these demands are not properly the subject of set-off, is there any ground to raise a presumption or inference that Henry Baldwin and Franklyn Baldwin entered into an agreement, in the lifetime of Henry, that the one demand was to be set off *pro tanto* as against the other?

1854.  
*Rolls.*  
BALDWIN  
v.  
BALDWIN.  
*Judgment.*

The Master has given credit out of the sum of £762. 3s. 6d., due by Franklyn to Henry, for the said sum of £470. 3s. 11d., due by Henry to Franklyn. That decision appears to be in conformity with the justice of the case; but I am required on this appeal to decide whether the order of the Master can be supported on strict legal principles.

As to the first question, I am clearly of opinion that there can be no set-off, under the circumstances of this case.

Henry Baldwin was, I apprehend, under no personal liability to pay to Franklyn Baldwin the interest of the sums charged on the estates, of which he (Henry) was tenant for life. A bill might have been filed against Henry and against the first tenant in tail, to raise the charge, and a receiver would have been appointed to keep down the interest, but no personal decree could, I apprehend, have been made against him. Barbara Morris Baldwin could not now institute any proceeding at law or in equity against the petitioner as the executor of Henry, to recover the said sum of £470. 3s. 11d.; and if not, what cross demand exists which could be the subject of a set-off? Possibly, William Baldwin, the tenant in tail, if obliged to pay the interest which accrued in the lifetime of Henry Baldwin, could recover such payment from the petitioner, as executor of Henry, out of Henry's assets; but William Baldwin is not party to this suit as tenant in tail, but as heir-at-law of the unsettled property (if any) of his father Franklyn Baldwin. I believe I omitted to mention that Henry Baldwin died without issue, whereupon Franklyn Baldwin became tenant for life of the lands on which the £3000 and £2000 were charged; and on his death, in 1849, his son William, the respondent, became tenant in tail; but he is not before the Court in this suit in that character, and no equity which he may have as tenant in tail against the petitioner, the executor of Henry Baldwin, can be enforced in this suit.

Even if Barbara Morris Baldwin could, as executrix of Franklyn Baldwin, institute proceedings against the petitioner, as executor of Henry Baldwin, to recover the £470. 3s. 11d. (which I apprehend she could not), that would not establish the right of set-off, as her

claim would be in the nature of a simple contract claim, and the set-off might lead to an undue administration of Henry's assets.

Cross demands arising in different rights cannot be made the subject of set-off. The cases on that subject are *Bishop v. Church* (a); *Whittaker v. Rush* (b); *Medlicott v. Bowes* (c); *Gale v. Luttrell* (d).

In *Freeman v. Lomas* (e), to which case I shall have to refer again on the second point which arises, Vice-Chancellor Wigram referred to and adopted those authorities.\*

The second question which arises in this case is, whether, if the demands are not properly the subject of set-off, there is any ground to raise a presumption or inference of an agreement, express or implied, between Henry Baldwin and Franklyn Baldwin, that the one demand was to be set off against the other?

It is of course clear, both at law and in equity, that where cross demands, whether properly the subject of set-off or not, have, by subsequent express agreement, been connected and stipulated to be set off against or deducted from each other, the balance is the debt, and is the only sum recoverable by the suit, without any plea or notice of set-off. The cases at Law, of *Sturdy v. Arnaud* (f), and *Dobson v. Lockhart* (g), are examples of that rule. It is also clear that in equity there may be an agreement, express or implied, that one demand is to be applied in satisfaction of another. The principal authorities on this subject, which were not cited in the course of the argument before me, and which, therefore, I presume were not cited to the Master, are referred to in the case of *Freeman v. Lomas* (h).

There is no evidence in this case of an agreement between Henry Baldwin and Franklyn Baldwin that the interest payable by Henry, as tenant for life of the settled lands to Franklyn Baldwin, should be deducted from the debts due by Franklyn to Henry, except such

(a) 3 Atk. 391.

(b) Amb. 407.

(c) 1 Ves. 207.

(d) 1 Y. & J. 180.

(e) 1 Hare, 112.

(f) 3 T. R. 599.

(g) 5 T. R. 132.

(h) 9 Hare, 109.

\* See the recent case at Law, of *Watts v. Rees* (18 Jur. 433, Exch.), which is at variance with *Mardall v. Thelluson* (21 Law Jour., Q. B., 410)

1854.  
Rolls.  
BALDWIN  
v.  
BALDWIN.  
Judgment.

1854.  
*Rolls.*  
 BALDWIN  
*v.*  
 BALDWIN.  
 Judgment.

agreement can be implied from the fact that nothing was paid by the one to the other during their joint lives.

The case most favourable to the question raised by the respondent Barbara is the case of *Downman v. Matthews* (*Precedents in Chancery*, p. 580.) Lord Macclesfield said—"That though generally stoppage was no payment, and that there were some cases where this could not be done—as a man could not stop his rent for money owing to him, or a bond toward satisfaction of a simple contract debt—yet in cases of this nature, where it appeared that the mutual dealings between the intestate and the plaintiffs were carried on for several years in this manner, without payment of any money on either side, it was a strong presumptive argument of an agreement for this purpose; and that without such liberty of retaining against each other, they would not have continued on their dealings: but if it had been insisted upon by either party that the other should not be allowed to set off his debt out of what was owing by him to the others—as they could—that this would have soon broken off all dealings between them—that this was the constant use among merchants and traders; and the only reason which induced them to take such goods as they wanted of one, rather than another, was, that such other person in his way should take of them the goods he wanted, and to set off one against the other."

Lord Hardwicke, referring to that case, in the case of *Ex parte Okenden* (a), said:—"The case of *Downman v. Matthews* and others appears to be a transaction between a clothier and a dyer; and there was evidence that they always made up their accounts by giving mutual credit—the dyer, on the one hand, for work done, and on the other hand, the clothier for his cloth."

In the case of *Hawkes v. Freeman* (b), there was some evidence, although slight, of an agreement to set off one demand against the other. Lord Macclesfield said:—"In mutual dealings between tradesmen, it is reasonable to suppose they intend one debt to be set off against the other, and the balance only to be paid, as it is for the Statute of Bankrupts, and therefore the least evidence of such intent is sufficient. Here is sufficient evidence of such intent."

(a) 1 Atk. 275.

(b) 8 Vin. Abr. (oct. ed.) 560.

In *Jeffs v. Wood* (a), the Master of the Rolls (Sir J. Jekyl) said :—" It is true stoppage is no payment, nor is it of itself a payment in equity ; but then a very slender agreement for discounting, or allowing the one debt out of the other, will make it a payment, because this prevents circuity of action and multiplicity of suits, which is not favoured at law, much less in equity ;" and he afterwards said :—" However, it seems that the least evidence of an agreement for a stoppage will do, and in these cases equity will take hold of a very slight thing to do both parties right ; and it is still more reasonable that where the matter of the mutual demand is concerning the same thing, there the Court should interpose, and make the balance only payable."

1854.  
Rolls.  
BALDWIN  
v.  
BALDWIN.  
Judgment.

In the case of *Freeman v. Lomas* (b), the facts were as follow :— Thomas Lomas the elder bequeathed £1000 to his daughter Mary Wood for life, and after her decease to her children, and died. Mary Wood had one child Martha, who married, in 1840, James Napier. Thomas Lomas the younger, the surviving executor and residuary legatee of the testator, paid £500 on foot of the legacy on the 15th of April 1842, and a joint receipt was given to him by Mary Wood and by Martha and James Napier. Martha Napier died ; and in December 1843, James Napier obtained administration to her. Between that period and 1847, the said Thomas Lomas the defendant became surety for James Napier, for various sums of money, for one of which sums he took a warrant of attorney from Napier to secure himself from liability. In December 1847, James Napier became bankrupt, and a *fiat* having issued, the plaintiffs were appointed assignees. After the *fiat*, Thomas Lomas the defendant was called upon to pay, and paid on account of his suretyship moneys exceeding what was due on the legacy. Mary Wood, the tenant for life of the legacy, died in January 1848. The bill was filed by the assignee of Napier, to recover the unpaid part of the legacy, with interest from the death of Mary Wood. The defendant Thomas Lomas admitted assets, but claimed to retain the portion of the legacy which remained unpaid, on account of the payment made by him in respect of his suretyship. Counsel for the defendant

(a) 2 P. Wms. 129.

(b) 9 Hare, 109.

1854.  
*Rolls.*  
 BALDWIN  
*v.*  
 BALDWIN.  
 —  
*Judgment.*

argued that "in such a case there are several authorities which affirm the principle, not, perhaps, strictly of set-off, but that a trustee or party who has money of another in his hands may retain it for a debt which such other person owes to himself. The Court presumes an agreement to have been made between the parties for setting off one demand against the other." Upon which Vice-Chancellor Wigram inquired from Counsel—"Do you say that this is a necessary presumption, or that circumstances must be shown to raise it?" Upon which Counsel replied—"It has been regarded as almost a necessary presumption." In giving judgment, Vice-Chancellor Wigram, after referring to the rule to be deduced from the Roman law, said (p. 113)—"It is to be seen how it has been dealt with by our Courts; and I believe that, upon examining the authorities, it will be found that, except under special circumstances, Courts of Equity have never allowed cross demands existing in different rights to be set off the one against the other. The cases on this point cited on the part on the plaintiffs, to which may be added *Chapman v. Deehy* (a), are distinct authorities against the right, in an ordinary case, to apply one of such demands in satisfaction of the other; but it is not to be denied, on the other hand, that agreement, express or implied, may confer such a right, and that slight circumstances may be sufficient to warrant the Court in presuming such an agreement. Thus the right was admitted in *Downman v. Matthews* (b), upon the course of dealing; in *Jeffs v. Woods* (c), upon the fact of the legatee having omitted to credit the executor with the goods supplied; and in *Jones v. Messop* (d), upon the ground of the objection as to the demands being in different rights having been removed by the answer. This being the position of the general question, as it stands upon the authorities, it is hardly necessary to consider the reasons on which the rule of the Court is founded. It is sufficient to refer to the judgment in *Jones v. Messop*, as explaining the principle of the rule, and to the judgment in *Bishop v. Church* (e), as pointing out the inconvenience to which a contrary

(a) 2 Vern. 117.

(c) 2 P. Wms. 128.

(b) *Ubi supra*.

(d) 3 Hare, 588.

(e) 3 Atk. 691.

rule would lead." It appears to be the result of the cases to which I have referred, that there must be some evidence to warrant the Court in presuming an agreement that one demand should be set off against the other.

In the present case there is no evidence, unless the non-payment of any sum on either side is to be considered evidence. At what period is the Court to infer that the alleged agreement took place? It could not have taken place prior to the 28th of January 1844; for the Master, in the cause of *Baldwin v. Belcher*, reported the entire interest due to Franklyn Baldwin on his portion of the charge. Henry Baldwin died in August 1848. What circumstance is there to show an agreement between January 1844 and August 1848?

The charge of the respondent Barbara, filed in the cause in which Elizabeth Baldwin is petitioner, and the said Barbara and others are respondents, on the 10th of February 1853, claims the entire interest on her testator Franklyn Baldwin's charge, and she verified that charge on oath. After that, viz., in April 1853, she filed her first discharge in the present matter, and claimed no set-off, and set up no agreement. Surely, if the several authorities to which I have referred are not to be overruled, I am not at liberty, in the absence of all evidence, to presume that an agreement was entered into between the 28th of January 1844, and the death of Henry in August 1848, that the claim of Franklyn should be deducted out of the claim of Henry.

The person who will suffer injustice in this case is William Baldwin, the tenant in tail, who will have to pay the interest which Henry Baldwin, the tenant for life, should have kept down; but I have already stated that he is not before the Court in his character of tenant in tail, and any equity he may have could not be established properly in the present suit. If he has to pay hereafter the interest which Henry should have kept down, probably he may take proceedings against the petitioner, and establish his claim against the assets of Henry; but it is better that I should not now offer any opinion on that point.

I have only to decide at present whether there is any evidence

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to support the declarations contained in the Master's decretal order, and I regret to come to the conclusion that there is not. I have already stated that the declarations in the Master's order are not at all precise. He declares:—"That as between Henry Baldwin and Franklyn Baldwin, all their mutual claims are to go against each other, and that the accounts between them are to be considered as if stated and settled at the time of the death of the said Henry." If the Master intended, by his declaration, that the respondent could insist on a case of set-off, the declaration is clearly erroneous, there being no colour of ground for the defence of set-off. If he intended, by this somewhat vague declaration, that it was to be implied that there was an agreement between Henry and Franklyn, that the claim of the one was to be set off against the claim of the other, I do not think there is any evidence from which such agreement is to be implied; and even if there was, the evidence to which I have referred, arising from the finding in the report of 1844, in the suit of *Baldwin v. Belcher*, and the charge filed by the respondent Barbara on the 10th of February 1853, in the suit in which Frances Elizabeth Baldwin is petitioner, is inconsistent with such inference.

I shall, therefore, make an order declaring that there is no evidence to sustain the declarations to which I have referred, contained in the Master's order of the 16th of February 1854, and that such declarations shall accordingly be set aside; and with such declaration I shall send the case back to the Master: and I shall declare that this order is to be without prejudice to any proceeding which the said Barbara Morris Baldwin, or the said William Baldwin, if so advised, may take against the petitioner, as executor of Henry Baldwin.

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Jan. 16.

May 17.

THE questions in this case, which arose under circumstances which it is unnecessary to state, as they are referred to at length in the judgment, were, first, whether under the will and codicil of Captain George Thomas (*infra*, p. 402), the legacy to his brother's children was specific or demonstrative or general?—Secondly, whether there had been an appropriation of the £2500, £3½ per cent. stock, to the payment of the said legacy?

A testator, by his will, dated in 1796, gave to his wife the sum of £1500, which he was possessed of by the death of his mother, and which he became entitled to under the marriage settlement of his father. By a codicil, in 1800, after stating that his brother E. had married and had children, he willed that after the death of his wife, the children of his two brothers E. and F. (should F. marry and

Serjeant *Christian* and Mr. *Hughes*, for the plaintiffs, argued that the legacy was a general legacy, demonstrative only so far as the particular fund out of which it was to be paid was pointed out, and was not adeemed: *Legrice v. Finch* (a); *Coleman v. Coleman* (b); *Chaworth v. Beech* (c); *Barker v. Rayner* (d); *Pulsford v. Hunter* (e); *Burgess v. Robinson* (f); and that there had been an appropriation of the fund, under the circumstances.

have issue) "should have the sum of £1687, which he got by the death of his mother, and that was charged on the estate of A, in such proportions as his wife should will it." At the date of the codicil, the £1687, which was the same sum as that left by the will, was lent on a judgment against A. It was paid off in 1803, and invested by the testator in £3½ per cent. stock. Held, that the legacy given by the codicil to the children of the testator's brothers was a general or demonstrative legacy (not a specific one), and was not adeemed by the payment of the judgment and investment of the moneys in the funds.

After the testator's death in 1803, his widow and executrix wrote a letter to E., enclosing a copy of the will, and in which she stated that the stock in which the money had been invested should ever be held sacred by her for E.'s children, and if it did not increase, it should never diminish. In 1816, an injunction was obtained by the children of E., then minors, to restrain the sale of the stock by the widow, under a misapprehension that she was about to sell it. E.'s children came of age at different times between 1820 and 1838, and the stock remained untouched until 1853, when the widow died. Held, that the letter amounted to an appropriation of the stock to the legacy by the executrix, which, under the circumstances, must be presumed to have been assented to by the children of E. as they came of age.

A fund ordered to be paid to the surviving plaintiffs, in an injunction suit, abated and dismissed by the 81st Order of 1843.

- (a) 3 Mer. 50.
- (c) 4 Ves. 555.
- (e) 3 Br. C. C. 416.

- (b) 2 Ves. 638.
- (d) 2 Russ. 122.
- (f) 3 Mer. 7.

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*Rolls.*  
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Mr. *F. Fitzgerald* and Mr. *Berkeley*, contra, contended that the legacy was specific; *Davis v. Morgan* (a); *Nelson v. Carter* (b); *Gardner v. Hatton* (c); *Ashburner v. Maguire* (d); *Pattison v. Pattison* (e); *Gillaume v. Adderley* (f); *Ellis v. Walker* (g); *Chaworth v. Beech* (h); *Chambers v. Jeoffrey* (i). On the question of appropriation, they cited *Hutchinson v. Hammond* (k).

#### THE MASTER OF THE ROLLS.

*Judgment.*

A motion has been made in this cause by the eight surviving plaintiffs (two of the plaintiffs, George Thomas and Martha, being dead, and the remainder having long since attained their age), that the injunction which issued in this cause on the 22nd of November 1816, restraining the Governor and Company of the Bank of Ireland from transferring the sum of £2500,  $£3\frac{1}{2}$  per cent. stock, of the then currency of Ireland, standing in the books of the Bank in the name of Captain George Thomas, of the city of Bath, may be dissolved, and that the Governor and Company of the Bank of Ireland do transfer the said stock (which amounts to £2307. 13s.,  $£3\frac{1}{4}$  per cent. stock, of the present currency) to the Rev. Francis Heaton Thomas, the administrator *de bonis non* with the will annexed of the said George Thomas.

Eliza Thomas the defendant, who was the widow and administratrix with the will annexed of the said George Thomas, died on the 26th of August 1853, and a cross notice has been served on behalf of Mr. Edward Fetherston her executor, that the Governor and Company of the Bank of Ireland do transfer to the said Rev. Francis Heaton Thomas so much of the said Government stock as will be equivalent to £1557. 4s. 7d., present currency (which sum is equal to £1687, late currency); and that the said Governor and Company do transfer the residue of the said Government stock to the said Edward Fetherston, as such executor of Eliza Thomas.

- (a) 1 Beav. 400.
- (c) 6 Sim. 93.
- (e) 1 M. & K. 12.
- (g) Amb. 310.
- (i) 2 Eq. Abr. 541.

- (b) 5 Sim. 530.
- (d) 2 Br. C. C. 108.
- (f) 15 Ves. 384.
- (h) 4 Ves. 556.
- (k) 2 Br. C. C. 128.

The bill in this cause stands dismissed, under the 81st of the General Orders of 1843; but that Order provides that it shall not affect any injunction obtained in an injunction suit.

As to the legal right to the fund, there is, of course, no doubt that the Rev. Francis Heaton Thomas, who is now the personal representative of George Thomas, is entitled. But the personal representative of Eliza Thomas resists the claim of the said Rev. F. H. Thomas to the entire of the fund in Court.

The £2500, late currency, mentioned in the injunction order of November 1816, was invested on the 20th of June 1803 in the then £3½ per cent. stock. The circumstances relating to said investment were these:—The said George Thomas was entitled to a sum of £1687, secured by judgment on the estate of a Mr. Armstrong; and that sum having been paid off in or about the month of June 1803, it was invested in his name in Government £3½ per cent. stock, on the 20th of June in that year, by the direction of the said George Thomas. The price of £3½ per cent. stock was then at the low quotation of £67½, and the price of £2500, the then currency, including interest and brokerage, being at that quotation £1704. 10s. 3d., of the then currency, Mr. George Thomas added £17. 10s. 3d. to the £1687, which made up the £1704. 10s. 3d., late currency, and with which sum the £2500, £3½ per cent. stock, late currency, was purchased. It is stated in the affidavit of the Rev. Edwin Thomas (filed the 17th of August 1816, to found the motion for the injunction), that the £17. 10s. 3d. was a part of the interest due on the £1687.

Mr. Edward Fetherston, the executor of Eliza Thomas, insists, under the circumstances which I shall hereafter state, that the surviving plaintiffs are only entitled to so much of the said sum (making in present currency £2307, £3½ per cent. stock, now standing to the credit of Captain George Thomas) as will be equivalent to the said sum of £1687, late currency, and that he, Mr. Edward Fetherston, as such executor of Eliza Thomas, is entitled to the balance of the stock. On the other hand, the plaintiff, the Rev. F. H. Thomas, insists, for the reasons I shall hereafter state, that he is entitled to have the entire of the stock transferred to him,

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*Judgment.*

on trust for himself and the surviving co-plaintiffs. The Bank will probably require that the stock should be first transferred to the credit of the cause, but that is a matter of form. As this suit is not only abated, but dismissed, I doubt whether a cause petition ought not to be filed; but as it appears, from the cases referred to in 2 *Dan. Chan. Prac.*, p. 1657, that I have jurisdiction to entertain the question, and as the parties are desirous I should do so, without any further proceeding, and without a reference to the Master, I shall decide the question on this motion, according to the wish of the parties.

The facts of the case are as follow:—It appears from certain marriage articles, bearing date on the 12th of September 1755, executed on the marriage of the Rev. George Thomas and Mary Armstrong, the father and mother of Captain George Thomas, in whose name the Government stock stands, and from a certain agreement of the 22nd of April 1803, executed between Mary Jane Thomas of the first part, and her brother Captain George Thomas of the second part, and one William Henry Armstrong of the third part, that the said Captain George Thomas was entitled to a sum of £1500, in his own right, under the said articles of 1755, and to a sum of £187, in right of his deceased brother John, under said articles; and which sums became payable under said articles to Captain George Thomas on the death of his mother in 1798; and it further appears that such sums were secured by a judgment on the estate of Mr. Armstrong, party to the said agreement of April 1803; and that such judgment was assigned by said deed of agreement, of the 22nd of April 1803, to the said Captain George Thomas, to secure said sums of £1500 and £187, making together £1687, of the late currency.

The said Captain George Thomas, being so entitled, made his will on the 22nd of May 1798, in the words following:—

“The last will and testament of George Thomas, Captain in the 18th Regiment of Foot.—I do will and bequeath to my dearly beloved wife, Elizabeth Thomas, the sum of £1500 sterling, which I am possessed of by the death of my mother, and which I became entitled to under the marriage settlement of my father. Should I be entitled to the sum of £300 more by my father's will, I do in

like manner bequeath her that, as also every sum of money I may be worth at the time of my decease, to be by her made use of as she may think proper, during her lifetime, and at her death to be disposed of likewise as she may think fit. This is meant to give her the full possession and dominion over every shilling I may die worth, as a small token of regard for the unvaried and unexampled good conduct of her towards me since the day of our marriage. And although this, my last will and testament, may not be executed in the exact legal form, yet I hope it is drawn up in a plain, intelligible manner, and in such a way as will not allow of any misconstruction whatever."

There is, of course, no doubt, that the £1500 mentioned in the will was the portion of the £1687, to which the defendant was entitled in his own right, and which is referred to in the deed of the 22nd of April 1803.

The testator, Captain George Thomas, executed a codicil to his will, on the 28th of December 1800, which is as follows:—

"Since the above will was written, my brother Edwin has married, and has children. 'Tis now my will, that after the death of my dear wife, the children of my two brothers Francis and Edwin Thomas (that is to say, should Francis marry and have issue) should have the sum of £1687, which I got by the death of my mother, and that is charged on the estate of R. Armstrong, Esq., in such proportions as my said wife at the time of her death may choose to will it; and should there not be any children by the marriage of my brother Frank, in that case the above sum to be divided, as already mentioned, amongst the children of Edwin George Thomas."

There is also no doubt that the £1687, mentioned in this codicil, consists of the £1500 referred to in the will, and in the said deed of the 22nd of April 1803, and of the £187 referred to in the latter instrument.

After the date of the will and codicil of Captain George Thomas, and in his lifetime, the sum of £1687 was paid off, viz., about the month of June 1803; and it was, as I have already stated, invested on the 20th of June 1803, together with the £17. 10s. 3d., part of the interest due on the £1687, in the purchase of £2500 Government

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*Rolls.*  
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*Judgment.*

1854.  
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 THOMAS.  
*Judgment.*

£3½ per cent. stock, late Irish currency. The testator, George Thomas, died shortly afterwards, namely, on the 23rd of August 1803. The circumstances of the payment of the £1687 in the lifetime of the testator George Thomas, and its investment in the funds in the manner I have stated, give rise to the question, whether the legacy of £1687 in the codicil was a specific or a demonstrative legacy? If it was a specific legacy, it was, of course, adeemed by being paid off in the lifetime of the testator, and after the date of the will and codicil; and the plaintiffs in such case could only claim a sum of £1687, and no more, under the will of Eliza Thomas, to which I shall hereafter advert. If it was a demonstrative legacy, the plaintiffs could only be entitled, under the codicil, to so much of the stock as would be equivalent to the £1687, unless, on the facts hereinafter stated, the entire of the stock in bank (*i. e.* the £2500, late currency) can be considered to have been appropriated after the death of the testator (who died in August 1803) to the payment of the legacy of £1687; which appropriation, if it took place, would have subjected the plaintiff, on the one hand, to the risk of a fall in the funds, and on the other hand, to the advantage of the rise in the funds which has taken place since the 20th of June 1803, when the price of £3½ per cent. stock was £67½.

On the 19th of June 1833, Eliza Thomas, the widow, made her will in the following words:—"Whereas, by the will of my late husband, dated 28th of December 1800, a power is given to me to bequeath the sum of £1687, late Irish currency, among the children of Francis and Edwin Thomas, in such proportions as I might choose to will it; and whereas Francis Thomas has died without having any issue; and whereas the said Edwin Thomas has several children—now, in pursuance of the power vested in me, I do hereby leave and bequeath the said sum of £1687, late Irish currency, to and among all the children of the said Edwin Thomas, in equal shares and proportions, share and share alike; and as to all the rest, residue and remainder of the property, of what nature and kind soever, I shall die seised, possessed of, or in any way entitled to, I leave and bequeath the same to my dear niece Elizabeth Dorothea Curtis, youngest daughter of the late William Curtis, to

and for her own sole and only use ; and I do hereby declare this to be my last will and testament, and appoint Travers Adamson and Cuthbert Fetherston, Esqrs., executors.—As witness, my hand and seal, this 19th day of June 1833.”

If the legacy of £1687, given by the codicil of the will of George Thomas, was a specific legacy, and adeemed, the plaintiffs, as I have already stated, could only claim under the will of Eliza Thomas, and in such case it is clear they would be entitled to £1687, late Irish currency, and no more.

The right of the plaintiffs, therefore, to the entire fund, depends on two questions—first, was the legacy of the £1687, given by the codicil to the will of George Thomas, a demonstrative or a specific legacy? secondly, if it was a demonstrative legacy, was the £2500; Government £3½ per cent. stock, set apart, and appropriated after the death of George Thomas, to the payment and discharge of the £1687?

First, was the legacy of £1767 demonstrative or specific? It appears to me that there is some difficulty as to that question.

In *Roper on Legacies*, 4th ed., vol. 1, p. 227, the rule of construction is thus stated:—“That when the gift of the legacy is so connected with the debt or security, as that the gift of the legacy and of the debt or security are the same, the intention to give nothing more than the identical debt or money due on the security is apparent, and consequently the legacy will be specific.” The case of *Chaworth v. Beech* (a), and other cases referred to by Mr. *Roper*, illustrate the rule laid down by him. In pp. 233, 234, Mr. *Roper* states, “A Court of Equity leans to the consideration that all bequests are general. It therefore requires expressions actually bequeathing the identical debt, or such a reference to it, appearing upon a strong, solid and rational interpretation of the will, as to raise a plain inference that the debt was the exclusive subject intended to be given by the testator to the legatee; for the bequest of a sum, with ever so plain a reference to the amount of a debt or fund out of which it is given, is very different from a gift of the fund itself, with all the chances of fluctuation in its

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(a) 4 Ves. 555.

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*Judgment.*

amount; so that when a legacy of a debt is in its form general, and it is endeavoured from the context of the will to construe such bequest specific, it can only be accomplished by such strong, solid and rational interpretation, to be put upon, and plain inference to be drawn from, the will as have been before mentioned."

Thus, in the case of *Legrice v. Smith* (a), the testatrix, reciting that it was "the wish and desire of her mother and herself, that the £500 they had then out upon mortgage should be given to Sophia Anne Legrice and her family, in manner thereafter mentioned," gave to her executors, immediately after her mother's death, the said £500, with all interest due thereon, for the said Sophia Anne Legrice, as therein mentioned. This money having been called in by the testatrix, the question was whether the bequest was not specific, and consequently adeemed; and Sir William Grant held the bequest to be general, it being made of a sum of money, and the security being only mentioned as descriptive of the then situation of the money,—money, and not the security, being the object of the gift. Sir Wm. Grant said, "The essential characteristic of the legacy is, that it consists of a sum in which the testatrix admits that her mother and herself had some sort of joint interest, and which they were both desirous of giving to Mrs. Legrice and her family. The characteristic was not at all dependent on the particular security on which the money might be placed. The testatrix considers the circumstance of its being at that time out on mortgage as merely accidental. She speaks of the £500 we have now out upon mortgage. That is descriptive of the present situation of the money. The next day it might not be out upon mortgage, but it would still be the £500 in which the mother and daughter had a joint interest, and which at the time of the will they had out upon mortgage. The thing given is not the mortgage, but the money. It is the said sum of £500 that she gives to her executors. What is the said sum?—the sum of £500, which belonged to her and her mother, and which at a given time was out upon the mortgage: whether it remained out upon mortgage at the time of the testatrix's death, appears to me to be a matter of indifference.

(a) 3 Mer. 50.

That circumstance is no ingredient in the gift, either by way of condition or of inherent description." Sir. Wm. Grant accordingly held that the legacy was not specific.

It is difficult to distinguish the principle on which that case was decided from the present. The testator, George Thomas, by his will bequeathed to his wife, Eliza Thomas, "the sum of £1500 sterling, which I am possessed of by the death of my mother, and which I became entitled to under the marriage settlement of my father." Eliza Thomas being by the will of the testator his residuary legatee, the question as to the bequest of the £1500 being a specific or demonstrative legacy under the will, and without reference to the codicil, would have been immaterial, as in either case Eliza Thomas would have been entitled; but I apprehend, if she had not been residuary legatee, and that it had been necessary to decide the question, the legacy of the £1500 would not have been held to be specific. The security on which the £1500 was outstanding (the judgment against Mr. Armstrong) is in no way referred to by the will. The sum bequeathed was the £1500, to which the testator became entitled under his father's marriage settlement, by the death of his mother; and whether that sum was outstanding, secured by Armstrong's judgment, or paid off and invested in the Government funds, it would have been equally the sum to which the testator became entitled by the death of his mother, under his father's marriage settlement.

The codicil recites that, since the will was written, the testator's brother Edwin had married and had children, and the testator directs that after the death of his wife, the children of his brothers Edwin and Francis (if the latter should marry and have children) "should have the sum of £1687, which I got by the death of my mother, and that is charged on the estate of H. Armstrong, Esq." The £1687 consisted of the £1500 mentioned in the will, which the testator was entitled to in his own right, and of the £187 which he was entitled to on the death of his mother, in right of his deceased brother John, as mentioned in the deed of agreement, of April 1803. The statement that the sum was charged on the estates of Mr. Armstrong was not strictly correct, as it was secured by a

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judgment, which was not, properly speaking, a charge on the land, as the law stood when the codicil was made. What the testator intended to give was the two sums of £1500 and £187, mentioned in the deed of 1803, and the judgment by which the sums were secured was not assigned to him until after the date of the codicil.

The testator did not intend that the general or demonstrative legacy of £1500 given by the will was, by a mere reference to the security to the codicil, to become a specific legacy as to the principal sum, after the death of the wife, but to remain a demonstrative legacy as to the interest on that sum during the life of Eliza Thomas. Suppose that Eliza Thomas had not been residuary legatee by the will, could it have been contended that the legacy of £1500 was, by the terms of the will, specific and adeemed, by being paid off in June 1803, there being no reference whatever by the will to the security on which it was outstanding? If not, the codicil merely intended to cut down the bequest to Eliza Thomas to a life interest in the sum, and not to make that a specific legacy as to her, by the codicil, which was a demonstrative or general legacy, under the terms of the will. It cannot, I think, be held that the legacy was general or demonstrative as to Eliza Thomas, but specific as to the children of the testator's brothers.

The £1500 was given by the will, without any reference to the security, so as to make it specific. The codicil intended to deal with the same sum of £1500, and also with the sum of £187, which the testator was entitled to in right of his deceased brother John. As to the £187, that passed under the general and residuary bequest in the will of Eliza Thomas. The bequests to Eliza Thomas, under the will, were cut down to a life interest by the codicil, as to the £1500, and as to the £187; but I cannot see any ground for holding that as to those sums she became a specific legatee by the codicil, as to the interest thereof for her life.

The language of Sir W. Grant, in the case referred to, is very applicable to the present case.

The essential characteristic of the legacy, taking the will and codicil together, is that it refers to a sum or sums to which the testator became entitled by the death of his mother, under the

marriage settlement of his father. The characteristic was not at all dependent on the particular security on which the money might be outstanding, such security not being referred to at all in the will. The reference in the codicil is not a very accurate description of the then security on which it was placed, and judgments not being under the law, as it then stood, properly speaking, any charge upon the lands. When the money was paid off in June 1803, it was still the sum which the testator became entitled to by the death of his mother, under his father's marriage settlement. The thing given was not the judgment, but the money. What is the sum mentioned in the codicil? It is not an entirely new sum previously undisposed of; it is, on the contrary, a bequest by which that which was a general or demonstrative legacy under the will of the entire and absolute interest in the sum is cut down to a life interest, by reason of the fact of a brother of the testator having married and had children. The object of the codicil was simply to reduce the absolute interest of the wife to a life interest; and that which was a general or demonstrative legacy to the wife under the will did not, in my opinion, become a specific legacy by the terms of the codicil; what was bequeathed being the sum or sums which the testator became entitled to by the death of his mother, under his father's marriage settlement, and the reference to the security by the codicil being, as Sir W. Grant said, only descriptive of the then present situation of the money.

There is, no doubt, some difficulty in reconciling all the authorities referred to by Mr. *Roper*; but on the whole, for the reasons which I have stated, I am of opinion that the legacy given by the codicil to the will of George Thomas was a general or demonstrative legacy, and was not therefore adeemed by the circumstance of its having been paid off and invested in the Government funds on the 20th of June 1803.

Assuming that I am right in holding that the legacy given by the codicil was a general or demonstrative legacy, and therefore not adeemed by the payment of Armstrong's judgment in June 1803, and its investment in the funds, the next question which arises is, whether the said sum of £2500, Government £3½ per cent. stock,

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late currency (which amounts at present to £2307. 13s. present currency, in £3 $\frac{1}{4}$  per cent. stock), was set apart, and appropriated by Eliza Thomas, after the death of the testator, for the payment and discharge, after her death, of the legacy in the codicil mentioned, she being entitled to the dividends thereof during her life; and whether such appropriation was assented to by the parties beneficially interested under the codicil, subject to the said Eliza Thomas' life interest in the fund.

It will be recollected that the £1687 was invested on the 20th of June 1803, by the testator's direction, in the purchase of £2500 (late currency) £3 $\frac{1}{4}$  per cent. stock; but in order to make up that exact amount of stock, the testator added the sum of £17. 0s. 3d., which was part of the interest of the £1687. The testator Captain George Thomas died, as I have already stated, shortly after the investment, viz., on the 23rd of August 1803. A letter has been produced, written by his widow, the said Eliza Thomas, to the Rev. Edwin Thomas, to whose children the £1687 was bequeathed after the death of Eliza Thomas, and which letter bears date the 7th of December, without any year; but from its contents it is, I think, clear, that it was written on the 7th of December 1803, but certainly not later than 1804; a copy of the will and codicil was inclosed therein. The postscript is in these words:—

“Don't be under any uneasiness at hearing the money has been paid in by William Armstrong, long since this will was written. It shall ever be held sacred by me for your children, and if it does not increase, it never shall diminish; it is now in Bank stock. To fulfil the wishes of one so truly loved, as you knew him to be by me, will be my greatest gratification, were they only expressed, much less committed to paper; and as far as I have the power of securing this money to your children after my death, I will do it, for I think they want it more than Frank's (should he ever have any)—as I reckon Frank rich. Remember me with true regard to your wife, and let me sometimes hear from you.”

“5 Burlington-street, Bath, December 7th.”

The Bank stock adverted to in the letter was obviously the £2500, £3 $\frac{1}{4}$  per cent. Government stock. It appears that in the

month of June 1816, some difficulty arose at the Bank, in relation to the payment of the dividends to Mrs. Eliza Thomas (although she had received them from her husband's death), in consequence, I believe, of the probate of the will not having been lodged; and a correspondence has been produced between Messrs. Puget and Co., then bankers in London, and Messrs. Latouche and Co. of Dublin, from which it appears that the Messrs. Puget and Co. wrote for a power of attorney, to be forwarded by Messrs. Latouche and Co. for execution by the said Elizabeth Thomas, to enable Messrs. Latouche and Co. to receive for her the dividends on the £2500 stock. This letter is very precise in its terms, and the power of attorney was only to authorise Messrs. Latouche to receive the dividends, and not to sell the principal. Mr. Newenham, who was a partner or clerk in Latouche's Bank, wrote, on the 8th of July 1816, to T. S. Berry, Esq., inquiring from him whether he had the letters of administration taken out by Mrs. Eliza Thomas; and he stated in that letter that Messrs. Puget and Co. had written, by her desire, to sell her £5 per cent. stock, and the letter concluded:—"The Bank cannot give a power of attorney until the above is exhibited to them." There was no £5 per cent. stock either in her or her husband's name, and it was a mistake referring to £5 per cent. stock, and the letter was also mistaken in stating that the Messrs. Puget and Co. had written for a power of attorney to be forwarded for execution by Mrs. Elizabeth Thomas for the sale of the stock, as the power of attorney, mentioned in the letter of Puget and Co., was to enable Messrs. Latouche and Co. to receive the dividends only. Thus there does not appear on that occasion to have been the slightest change of purpose on the part of Mrs. Eliza Thomas, as expressed in the postscript to the letter of the 7th of December 1803, or any intention whatever of selling out the stock. Mr. Berry wrote on the same day, the 8th of July 1816, to Messrs. Reeves, solicitors for Mr. Edwin Thomas, inclosing Mr. Newenham's letter, and stating to Messrs. Reeves—"I know, not what the inclosed means, if it be not to sell off the stock settled upon Mr. Edwin Thomas' children."

1854.  
Rolls.  
THOMAS  
v.  
THOMAS.  
Judgment.

1854.  
*Rolls.*  
 THOMAS  
*v.*  
 THOMAS.  
 Judgment.

The effect of Mr. Newenham's unbusinesslike and inaccurate letter, misrepresenting the facts, was, that an injunction bill was filed on the 22nd of July 1816, by the children of the Rev. Edwin Thomas, who were then minors, by him as their father and next friend, against the Bank of Ireland, and against Mrs. Eliza Thomas, to prevent the sale of the said £2500, £3½ per cent. stock, and an injunction having been obtained *ex parte*, it was served on the Bank, but no subpoena appears ever to have been served on Mrs. Eliza Thomas, nor does she appear ever to have had notice of, or to have heard of, the proceeding. The bill was in effect filed under an entire misapprehension caused by Mr. Newenham's inaccurate letter—it being clear, in my opinion, that Mrs. Eliza Thomas never contemplated selling out any portion of the principal.

It appears from inquiry made at the Bank of Ireland, that on the 25th of September 1816, Mrs. Eliza Thomas executed a power of attorney to Messrs. Latouche and Co., to receive the interest only; and there is no evidence whatever that she ever changed the intention expressed in the letter of the 7th of December 1803, or contemplated selling out the principal.

The ten children of the Rev. Edwin Thomas came of age in the following years, viz., 1820, 1822, 1824, 1825, 1826, 1827, 1829, 1830, 1832 and 1838, as appears by a consent which has been signed by the parties. The question upon that state of facts is, whether there was an appropriation by Mrs. Eliza Thomas of the £2500 Government £3½ per cent. stock, which stood in her husband, the testator's, name at the time of his death, in August 1803, and which she, in pursuance of her letter of the 7th of December 1803, to the Rev. Edwin Thomas, allowed to remain to the same credit up to the time of her death on the 20th of August 1853, and which still stands to the same credit?

There may be an appropriation of a sum in stock for the payment of a legacy either by the Court of Chancery or *in pais*. If the legatees are under disability, an appropriation must, it has been contended, be by the Court, or it will not be binding. If, however, the parties are not under disability, it is, I apprehend, clear,

that there may be an appropriation *in pais*, with the consent of the executor and the legatees.

I am of opinion that the letter of the 7th of December 1803 was an appropriation by Eliza Thomas of the £2500 Government £3½ per cent. stock, or at all events, of all the said stock, except the sum of £17. 0s. 3d., added to make the exact sum of £2500. The Rev. Edwin Thomas, whose children were entitled to the £1687, under the codicil, after the death of Eliza Thomas, was the person to whom the letter of the 7th of December 1803 was written by Eliza Thomas. There were at the time only three children, the remaining seven having been born afterwards. I think I am bound to presume that his children, who came of age at the periods I have mentioned, made inquiry about the legacy bequeathed to them, and must have been aware of the letter of the 7th of December 1803, and that the sum of £2500 stock had been appropriated by Eliza Thomas, and an injunction granted, which, although Mrs. Eliza Thomas knew nothing of the injunction suit, precluded the Bank from transferring the stock. The £2500 stock has remained untouched for upwards of half a century, appropriated by the personal representative, by the letter of December 1803, to the payment of the legacy. Surely the assent of the legatees to the appropriation must fairly be presumed, after such a lapse of time.

Upon the whole, I am of opinion that there was an appropriation on the 7th of December 1803, by Eliza Thomas, of the sum of £2500, late currency, Government £3½ per cent. stock, and that under the circumstances that appropriation may be fairly presumed, having regard to the injunction suit, and the lapse of time, to have been assented to by the children of the Rev. Edwin Thomas, as they respectively came of age—the youngest having attained her age upwards of fifteen years before the death of Eliza Thomas.

I shall, therefore, make an order, on the motion of the Rev. Francis Heaton Thomas, the administrator *de bonis non* with the will annexed of the testator George Thomas (the surviving children of the Rev. Edwin Thomas so desiring), declaring that he is entitled to be paid, as such administrator, the said Government stock—he,

1854.  
Rolls.

THOMAS  
v.

THOMAS.

Judgment.

1854.  
*Rolls.*  
 THOMAS  
*v.*  
 THOMAS.  
*Judgment.*

the said Francis Heaton Thomas, undertaking to pay Mr. Edward Fetherston, executor of the said Eliza Thomas, out of said stock, his costs of appearing on this motion.

I apprehend that the £17. 0s. 3d., which was interest on the £1687, was intended to be appropriated by Mrs. Eliza Thomas, together with the rest of the stock, to secure the £1687. But if not, the costs which will be payable under this order to Mr. Fetherston will exceed that sum.

April 21.  
 May 27.

### GERAGHTY v. GERAGHTY.

The executor of a trustee having been ordered to invest a sum in stock, to the credit of a cause, and having neglected to do so for two years, during which the funds fell :—  
*Held* (affirming the Master's order), that he was bound to pay the price of the sum in stock.

The day on which he was ordered to invest it, with interest, at £3½ per cent. only, from that day.

By a decree made in the cause of *Prior v. Geraghty*, on the 23rd of January 1851, Edward Geraghty, the executor of James Geraghty, was ordered within two months to invest a sum of £1369. 8s. 11d., £3½ per cent. stock, in the names of trustees, if appointed, or to the credit of the said cause; and to pay a sum of £65 with subsequent interest on the said sum of £1369. 8s. 11d., up to the day of payment, at the rate of £6 per cent., to the plaintiff A. M. Prior.

The sum was not invested; and a petition having been filed for administration of the assets of James Geraghty, and the matter having been referred to the Master, under the 15th section of the Chancery Regulation Act, the Master made a decretal order on the 17th of February 1854, by which he declared, that the plaintiffs in *Prior v. Geraghty* were entitled to be paid the sum which would replace the £1369. 8s. 11d. in stock, at the price of the 23rd of March 1851, two months from the date of the decree in *Prior v. Geraghty*, with £6 per cent. to that day, and £3. 5s. per cent. interest on said sum, from the 23rd of March 1851.

The price of £1369. 8s. 11d. stock, on the 23rd of March 1851, was £1382. 6s. 1d., and in February 1854, considerably lower. The plaintiffs in *Prior v. Geraghty* moved to vary the Master's order,

by charging Edward Geraghty with interest at £6 per cent. on £1382. 6s., from the 23rd of March 1851, instead of £3. 5s. per cent.

1854.  
Rolls.  
GERAGHTY  
v.  
GERAGHTY.

The several proceedings, and the modes of calculation proposed, are stated at length in the judgment.

Statement.

Mr. *Leach*, for the motion.

Argument.

Mr. *Gibbon* and Mr. *Chatterton* opposed it.

The 106th Rule of 1843; *Bate v. Scales* (a); *Burnell v. Brown* (b); *Pocock v. Redington* (c); *Jameson v. Taner* (d); *Long v. Steward* (e); *Mosley v. Ward* (f) *O'Brien v. O'Brien* (g); were cited.

THE MASTER OF THE ROLLS.

May 27.

Judgment.

A motion has been made in this case, on behalf of the Rev. John Prior and others, creditors of James Geraghty, deceased, by way of appeal from the order of Edward Litton, Esq., the Master in this matter, bearing date the 17th of February 1854, that the said order and the 4th schedule thereto may be varied in the following particulars, that is to say, by computing interest from the 23rd of March 1851, to the 15th of November 1853, at the rate of £6 per cent. per annum on the principal sum of £1382. 6s. 1d. cash, mentioned in the said schedule, instead of computing interest during the said period at the rate of £3. 5s. per cent. per annum, on the sum of £1369. 8s. 11d. in the said 4th schedule mentioned, and by computing interest from the said 15th of November 1853, to the 1st day of February 1854, at the rate of £6 per cent. per annum, as in the notice mentioned, instead of computing interest during the said last mentioned period at the rate of £3. 5s. per cent. per annum, as in said schedule mentioned.

(a) 12 Ves. 402.

(b) 1 Jac. & W. 175.

(c) 5 Ves. 600.

(d) 3 Ir. Eq. Rep. 346.

(e) 5 Ves. 800, n.

(f) 11 Ves. 581.

(g) 1 Moll. 533.

1854.  
*Rolls.*  
**GERAGHTY**  
*v.*  
**GERAGHTY.**  
*Judgment.*

On the 23rd of January 1851, a decree was made by the Lord Chancellor, in a cause in which the Rev. John Prior and the other parties on whose behalf this motion has been made were plaintiffs, and the respondent Edward Geraghty was the defendant, whereby it was declared by his Lordship, that the assets of the late James Geraghty, the surviving trustee and executor of the will of the late Rev. Thomas Prior, were liable to replace the sum of £1369. 8s. 11d., £3¼ per cent. Government stock (being part of the trust fund in the pleadings mentioned), misapplied by the said James Geraghty, in his lifetime: and it was further declared that the plaintiffs were entitled to be paid the sum of £65, being the amount due for interest on the sum so misapplied by the said James Geraghty, such interest being calculated up to the 23rd of January 1851 (*i.e.*, the date of the decree), at the rate of £6 per cent. per annum; and the said decree stating that the defendant Edward Geraghty, the executor of James Geraghty, admitted assets of the said James Geraghty, it was ordered that Edward Geraghty should, within two months from the date of the decree, replace the said sum of £1369. 8s. 11d., £3¼ per cent. stock, and invest the same in the name of the trustees, thereafter appointed, and that if the trustees were not appointed within said two months, the said Edward Geraghty should transfer said stock to the credit of this cause; and it was by the said decree further ordered that the said Edward Geraghty should pay the said sum of £65, with subsequent interest on the said sum of £1369. 8s. 11d., up to the day of payment, at the rate of £6 per cent. per annum, to the plaintiff Alicia Maria Prior.

The petition in this matter was presented by the petitioners Fanny and Bessy Geraghty, under the 15th section of the Chancery Regulation Act, for the administration of the assets of the said James Geraghty. The Master made his decretal order in this matter on the 17th day of February 1854, which contains the following declaration:—"It appearing to me that by the decree in the cause of *Prior and others v. Geraghty*, bearing date the 23rd of January 1851, the said respondent, Edward Geraghty, was ordered, within two calendar months, to replace the sum of

£1369. 8s. 11d., £3½ per cent. stock, in the said decree mentioned, and invest the same, as therein provided, with interest to the day of payment, at the rate of £6 per cent. per annum; and that the said Edward Geraghty has not yet replaced or invested the said sum of stock, I declare that the plaintiffs in the said suit of *Prior v. Geraghty* are entitled to be paid so much cash, as, at the price of the 23rd of March 1851 (being two months from the date of the said decree), would replace the said sum of £1369. 8s. 11d. in said stock, with interest, at the rate of £6 per cent. per annum, from the date of said decree, to the said 23rd of March 1851, and with further interest on the said sum of £1369. 8s. 11d. (or the balance thereof remaining due), at the rate of £3. 5s. per cent. per annum, being equivalent to the dividends which said stock would have produced if replaced, pursuant to the said decree; and I have included the said sum in the said fourth schedule accordingly."

The Master has accordingly, in the fourth schedule, charged Mr. Edward Geraghty with the sum of £1382. 6s. cash, being the value at the price of the 23rd of March 1851, of the said sum of £1369. 8s. 11d., Government stock. It will be recollected that the 23rd of March 1851 was the last day allowed by the decree of the 23rd of January 1851, to transfer said amount of stock.

The Master has further, by the fourth schedule, charged Mr. E. Geraghty with the sum of £65, mentioned in the decree, being the interest, at £6 per cent., on the said sum of £1369. 8s. 11d., to the date of the decree. The Master has further carried on the charge of interest at £6 per cent. on said sum of £1369. 8s. 11d., to the said 23rd of March 1851. From that day the Master has only charged interest at the rate of £3. 5s. per cent.

Counsel for Mr. Geraghty contends that there were two modes in which the Master might have charged him:—First, the mode adopted by the Master, of charging him (Mr. E. Geraghty) as if the decree had been strictly performed in every particular; secondly, charging Mr. E. Geraghty with £6 per cent. on the £1369. 8s. 11d., down to the date of the decretal order, but in such case only charg-

1854.  
Rolls.  
GERAGHTY  
v.  
GERAGHTY.  
Judgment.

1854.

*Rolls.*GERAGHTY  
v.

GERAGHTY.

*Judgment.*

ing him with such principal sum as, at the price of the date of such order, would replace the £1369. 8s. 11d. stock. Mr. E. Geraghty does not object to either of these modes, and offered, on the argument by his Counsel, to consent to be charged in the latter manner, if the plaintiffs in the suit of *Prior v. Geraghty*, and who have taken the objections to the Master's decretal order, should so desire. Counsel, however, for the plaintiffs in that suit, object to either mode of charge, and insist that Mr. E. Geraghty should be charged with the sum of £1369. 8s. 11d., £3 $\frac{1}{4}$  per cent. stock, on the 23rd of March 1851, although said sum of cash would, from the fall of the funds, far more than replace the said sum of Government stock at the present price of the funds, or the price at the date of the decretal order; and further, that although he is to have the benefit of the decree, as if strictly performed by the investment on the 23rd of March 1851, he is also to charge Mr. E. Geraghty with £6 per cent. on the sum of £1382. 6s. 1d., up to the date of the decretal order, treating the decree in that respect as unperformed.

It appears to me that one or other of the modes pointed out by Mr. Geraghty's Counsel is the correct mode of charging him, and that either the decree is to be considered as if performed on the 23rd of March 1851, and Mr. Geraghty charged, so as to put the plaintiffs in the suit exactly in the position they would now have been if it had been performed, or the decree should have been carried out precisely as of the date of the Master's decretal order. The plaintiff's Counsel blows hot and cold, and seeks to charge the respondent with the price of the funds on the 23rd of March 1851, as if he had invested stock on that day, and at the same time seeks to charge him with £6 per cent. to the date of the Master's order, on the sum as if not invested.

The plaintiffs in the cause of *Prior v. Geraghty* are, in my opinion, at liberty to charge Mr. Geraghty, as if he had invested the stock on the 23rd of March 1851, and in such case with £3 $\frac{1}{4}$  per cent. from that date, or to charge him with £6 per cent. to the date of the Master's order, or the present time; but in such case he

should only be charged with such sum as would now replace the Government stock.

Counsel for the plaintiffs, in the cause of *Prior v. Geraghty*, declining to assent to either mode of charge, I shall refuse the motion, with costs.

1854.  
*Rolls.*  
GERAGHTY  
v.  
GERAGHTY.  
Judgment.

In the Matter of the Act 11 & 12 Vic., c. 68, and of the Trusts of the Will and Codicil of THOMAS CASEY.

May 14, 20.

WILLIAM CASEY being entitled, under the will of Thomas Casey, to an annuity of £50 a-year for his life, after the death of Anne Casey, and also as residuary legatee to the fund out of which another annuity for the life of Alice Casey was provided, by the settlement executed on his first marriage, on the 20th of July 1833, assigned the former annuity to trustees in trust, after the death of Anne Casey, to pay and hand over to the said William Casey the said annuity for his life, or *until he should become bankrupt or insolvent*; and from the time of his death, or of his so becoming bankrupt or insolvent, upon certain trusts, which are stated in his Honor's judgment.

W. C. being entitled to an annuity, and to a certain fund in reversion, on his first marriage, assigned them to trustees in trust, to pay the annuity to W. C. for life, or until he should become bankrupt or insolvent; and from the time of his death, or of his so becoming bankrupt or

insolvent, upon trust, in favour of the wife and the issue of the marriage. Upon his second marriage, W. C. assigned to trustees another fund, to which he was entitled after the death of A., in trust for himself for life after the death of A., or until he should fail in circumstances, or become bankrupt or insolvent; and after his decease, bankruptcy or insolvency, to pay the principal sum amongst his two children of the first marriage, and the issue of the second marriage, as he should appoint, &c. *Held*, that the insolvency in the settlement on W. C.'s first marriage, on which the limitation over was to take effect, was an inability to pay his debts, and not taking the benefit of the Insolvent Act.

*Semble*.—A limitation in a settlement, that the settlor's property shall go over on his insolvency, is valid.

*Held*, that the limitations in both the said settlements were valid as against trustees, to whom W. C. had assigned his life interests for the payment of his creditors, when he was unable to meet his debts and liabilities.

*Held also*, that a failure, bankruptcy or insolvency, meant by the second settlement, before the death of A., the first tenant for life, would give effect to the limitation over.

1854.

Rolls.

CASEY'S  
TRUSTS.—  
Statement.

Upon his second marriage, on the 22nd of January 1846, William Casey assigned to trustees the principal sum producing the annuity of £50 a-year, to Alice Casey, upon trust, to pay said annuity to himself for life, after the death of the said Alice, or *until he should fail in circumstances, or become bankrupt or insolvent*; and after his decease, bankruptcy or insolvency, to pay and apply the said principal sum, and all the dividends thereon, amongst Margaret and Thomas, the children of his first marriage, and also the issue of his then intended marriage. There was issue of the second marriage, Richard Casey.

On the 24th of March 1848, William Casey, being then utterly unable to meet his debts and liabilities (though he had not taken the benefit of the Insolvent Act), assigned his life interest in the said annuities to William James Shaw and Eugene Sullivan, in trust, for the payment of his creditors.

Funds applicable to the payment of the annuities having been lodged in Court, under the Trustee Relief Act, the Master made his report, under an order of reference made on the petition of Alice Casey, and thereby found that William Casey being insolvent within the meaning of the settlements, Margaret and Thomas Casey were entitled to the fund producing the annuity payable to Anne Casey (who was dead), and the dividends thereof, from the 24th of March 1848; and that Margaret Casey, Thomas Casey and Richard Casey, were entitled to the principal sum producing the annuity of £50 a-year, payable to Alice Casey; and that the deed of the 24th of March 1824 had no validity or operation against their rights.

William James Shaw and Eugene Sullivan objected to the report.

The limitations in the settlements, and the several proceedings in the matter, are stated more fully in the judgment.

Argument.

Mr. F. Fitzgerald and Mr. Robert R. Warren, for the objections, contended, first, that the insolvency meant by the settlements meant taking the benefit of the Insolvent Act, and not a mere inability to pay debts. This was clear from the word "insolvent" being coupled in the settlement with the word "bankrupt:" *In re*

*Birmingham Benefit Society* (a). Secondly, that the limitations in both settlements, which were to take effect on the bankruptcy or insolvency of William Casey, were invalid. For although a person giving property to another might so frame the gift as that it should not endure after bankruptcy or insolvency, and effectually limit it over, *Brandon v. Robinson* (b), a person could not so limit his own property. That was settled in the case of bankruptcy: *In re Murphy* (c); *Higginbotham v. Holme* (d); *In re Beahan* (e); and there was no reason why the law should be different in the case of insolvency: *Gill v. Morgan* (f); *Hall v. Cooper* (g); *Phipps v. Lord Ennismore* (h); *Synge v. Synge* (i). Thirdly, they contended that the insolvency, to give effect to the limitation in the second settlement, must take place after the death of Alice Casey, who was yet alive.

1854.  
Rolls.  
CASEY'S  
TRUSTS.  
Argument.

Counsel in support of the Master's report relied on *De Tastet v. Smith* (k).

THE MASTER OF THE ROLLS.

May 20.  
Judgment.

A motion has been made in this case on behalf of Messrs. Eugene Sullivan and William James Shaw, who claim under the deed of assignment of the 24th of March 1848, in the report of William Brooke, Esq., the Master in this matter, mentioned, to vary said report, on the grounds stated in the objections taken thereto.

An order of reference was made in this cause on the 14th of February 1851, whereby it was referred to the Master to inquire and report who is or are the parties entitled, and in what manner and proportion, to the sum of £5316, Government £3½ per cent. stock, standing to the credit of this matter, and the dividends which should accrue thereon; and that he should allocate the said stock and dividends amongst the parties entitled thereto.

(a) 3 Sim. 421.

(b) 18 Ves. 429.

(c) 1 Sch. & Lef. 44.

(d) 19 Ves. 88.

(e) 1 Sch. & Lef. 179.

(f) Smy. 60.

(g) Smy. 168.

(h) 4 Russ. 131.

(i) *Supra*, p. 362.

(k) 1 Keen, 161.

1854.  
*Rolls.*  
CASEY'S  
TRUSTS.  
—  
*Judgment.*

The Master made his report on the 25th of April 1854; and it appears from the said report that Thomas Casey, deceased, made his will and two codicils, bearing date respectively the 13th, 20th and 24th of April 1833, whereby he bequeathed all his property to trustees on trust (amongst various other bequests not necessary to refer to on this motion), to pay his wife Anne Casey an annuity of £50 a-year for her life; also to pay to testator's sister Alice Casey (the petitioner) an annuity of £50 for her life; and the testator directed that on the decease of his wife Anne Casey, the annuity of £50 a-year bequeathed to her for life should go and be paid to his nephew William Casey, son of testator's brother George Casey, for life; and that upon the death of the said William Casey, the principal money from which the said annuity should arise should go and be paid to such of the said William Casey's children as he should, by deed or will, in writing, appoint; and, in case of no appointment, to the said William's personal representatives.

There was no further disposition in the will as to the annuity of £50 a-year bequeathed to Alice Casey for life; but William Casey, as the residuary legatee of the testator Thomas Casey, would, upon the death of Alice Casey, have been entitled to the fund set apart to secure said annuity, if no disposition had been made by him affecting said fund:

The report further finds that William Casey, being under the provisions of the said will of the said Thomas Casey entitled in reversion to the fund producing the said annuity of £50 a-year, payable to the said Anne Casey, intermarried with Margaret Murray on or about the 20th of July 1833, and that on the occasion of the said marriage, a deed of settlement was duly executed, whereby the said William Casey assigned to the trustees of the settlement the said annuity of £50 a-year, bequeathed to him by said will, after the death of Anne Casey, and the principal sum of money out of which the said annuity then arose or should thereafter arise or become payable, to hold the same from the decease of the said Anne Casey upon trust, after the solemnisation of the marriage, to pay and hand over to the said William Casey the said annuity for his life, or until he should become bankrupt

or insolvent; and from the time of his death or of his so becoming bankrupt or insolvent, in case the said Margaret Murray would be then living, in trust, to pay and hand over the said annuity to the said Margaret Murray for her separate use, &c. &c.; and from and after the decease of the said Margaret Murray, whether the said William Casey should be then living or dead, if the said William should have previously become bankrupt or insolvent, or in case the said William should survive the said Margaret Murray, and should not previously have become bankrupt or insolvent, but should afterwards so become bankrupt or insolvent, then upon trust, from the decease of the said Margaret Murray, or the time of becoming bankrupt or insolvent of the said William Casey, for the issue of the said intended marriage, in manner as by the will of the said Thomas Casey is directed and appointed; and in case the said Margaret Murray should survive her then intended husband, then upon trust to pay the said annuity to the said Margaret for life, and after her decease then upon trust for William Casey, his heirs and assigns; and in case the said William Casey shall survive the said Margaret Murray, and shall not during his lifetime have become bankrupt or insolvent, then upon trust, after his decease, for the issue of the said intended marriage, and in failure of issue, subject to the appointment of the said William, as in and by the will of the said Thomas Casey is directed.

The report finds that William Casey survived the said Margaret, and that there are issue of the marriage, two children, viz., Margaret and Thomas Casey. The report finds that the said Anne Casey died prior to the year 1848.

The report further finds that the said William Casey was, on the 24th of March 1848, utterly unable to meet his debts and liabilities, and was insolvent within the meaning of the said settlement of the 20th of July 1833; and that on the said 24th of March 1848, the said Margaret and Thomas Casey became and were lawfully entitled to the principal sum or fund producing the annuity, so as aforesaid payable to said Anne Casey, and the dividends or annual produce thereof from the said last mentioned day, and that same are now payable to and for their use.

1854.

*Rolls.*CASEY'S  
TRUSTS.*Judgment.*

1854.

*Rolls.***CASEY'S  
TRUSTS.***Judgment.*

The report further finds that the said William Casey again inter-married on the 27th of January 1846, with Esther Andrews, and that upon the occasion of the said marriage, and in consideration thereof, and of the sum of £250, the fortune of the said Esther, the said William Casey assigned to the trustees the principal sum producing the sum of £50 a-year, payable to the petitioner Alice Casey, upon trust to pay the said annuity to William Casey for life, after the death of the said Alice, or until he should fail in circumstances, or become bankrupt or insolvent; and after his decease, bankruptcy or insolvency, to pay and apply the said principal sum, and all the dividends thereon, amounting to £50 a-year, to and amongst the aforesaid Margaret Casey and Thomas Casey, the children of his first marriage, and also the issue of his then intended marriage, in equal shares, but subject to the power of appointment thereof amongst them; and in case of the death of all the children of the said William Casey by his first and second marriage in his lifetime, then upon trust to pay the interest thereof to the said Esther Andrews for life, and after her death to pay the principal sum to such persons as the said William should by deed or will appoint, or, in default of appointment, to the next-of-kin of the said William Casey.

I have already observed that there was no disposition, by the will of Thomas Casey, of the annuity of £50 a-year to Alice Casey, after her death, although probably the double disposition of the annuity to the testator's mother Mary Anne, after the death of the latter, was a mistake in the will, and that the second disposition of the annuity to Mary Anne Casey, after her decease, was intended to apply to Alice's annuity. However, William Casey was residuary legatee of Thomas Casey, and as such was entitled to the reversionary interest in Alice's annuity, or of the fund set apart to pay it, provided all the other legacies and annuities bequeathed by the will have been fully provided for; but it is difficult to understand this case, in consequence of the money having been irregularly lodged to the trusts of the will generally, instead of to the trusts of any particular annuities or legacies.

I requested Counsel for the trustees to furnish me in writing with a statement of what annuities and legacies the fund lodged

was intended to be applied to, and I find it impossible to understand the explanatory document sent. I may observe that I shall distribute no part of the fund in Court, unless the petitioner or the trustee, or some party interested in the fund, takes the trouble of having the matter properly explained to the Court. These difficulties, however, do not affect the legal question which I have to decide, on the present motion to vary the report.

1854.  
*Rolls.*  
CASEY'S  
TRUSTS.  
*Judgment.*

The report finds that Esther Andrews, the second wife of William Casey, is dead, and that there is issue of said second marriage, one child, Richard Casey, who with the before-named Margaret and Thomas Casey became and were on the said 24th of March 1848 (the said William Casey having failed in his circumstances, and then being insolvent, within the meaning of the last mentioned settlement) entitled to the said principal sum so producing the said annuity of £50 a-year, now payable to the petitioner Alice Casey, pursuant to the trusts of the will of Thomas Casey.

The report further finds that the said William Casey, by deed bearing date the 24th of March 1848, and in which deed said settlements of 1833 and 1846 are recited, professed to assign and appoint a life interest, then alleged to be in him, of the said annuity of £50 a-year, originally bequeathed to Anne Casey, deceased, for life, as also an alleged life interest in remainder, in said annuity of £50 a-year, payable under the said will at present to the petitioner Alice Casey, for her life—to William James Shaw and Eugene Sullivan, as trustees for certain creditors. And the report then finds that the said deed of the 24th of March 1848 has not, nor had it ever, any validity or operation, as against the aforesaid rights of the said Margaret Casey and Thomas Casey and Richard Casey; and that the said Messrs. Shaw and Sullivan are not entitled to set up the said deed, to defeat the said rights, and that the case alleged by them in that behalf has altogether failed.

The first question which has been raised by Counsel for Messrs. Eugene Sullivan and William James Shaw relates to the provision in the settlement of the 20th of July 1833, by which the annuity of £50-a year (bequeathed to Anne Casey for life, and after her

1854.

Rolls.

CASEY'S  
TRUSTS.

Judgment.

death to William Casey for life) was vested in trustees, in trust for the issue of the marriage (Margaret Murray being dead), from the time when the said William Casey should become bankrupt or insolvent.

It is expressly found by the report that William Casey was, on the 24th of March 1848, utterly unable to meet his debts and liabilities, and was insolvent within the meaning of the said settlement of the 20th of July 1833. No objection has been taken to the report, so far as the fact of insolvency is found; but it is insisted that the provision in the settlement limiting the property over to the children, in the event of William Casey's becoming insolvent, is to be construed his being discharged as an insolvent debtor, under the provisions of the Insolvent Acts; and that as he has not been discharged as an insolvent under these Acts, the limitation over has not taken effect, and that if it has not taken effect, the deed under which the said Eugene Sullivan and William James Shaw claim is effectual to vest in them the life interest of William Casey, in the annuity in said settlement of 1833 mentioned.

In support of this argument, Mr. *Fitzgerald* has referred to the case of *In re Birmingham Benefit Society (a)*. It was decided in that case by Sir L. Shadwell, on the construction of the statute 31 G. 3, c. 34, s. 10, that the word "insolvent" meant a person who has taken the benefit of the Insolvent Debtors Act, and not one who has merely made an assignment of his effects for the benefit of his creditors. The reference, however, to the assignees of the person who should become bankrupt or insolvent afforded ground for saying that the Legislature meant to use the term "insolvent" in its technical sense.

No case was referred to in support of the Master's decision. However, I find that there are some cases which were not referred to, which sustain his decision on this point.

In the case of *Parker v. Gossage (b)*, the plaintiff and defendant entered into a written agreement, the one to purchase and the other to sell all the salt made at the salt works of the defendant for fourteen years, but it was provided that the bankruptcy or

(a) 3 Sim. 421.

(b) Tyr. &amp; Gr. 105; S. C. 2 C. M. &amp; R. 617.

insolvency of the plaintiff should terminate the contract. It was held that the word insolvency was used in its natural and not in its artificial sense, and that the contract was put an end to by the plaintiff being unable to pay his debts, although he had not taken the benefit of the Insolvent Act. Counsel for the plaintiff referred to the case of *In re Birmingham Benefit Society*, relied on by Mr. F. Fitzgerald, in this case, in which the Vice-Chancellor held that the word "insolvent," in the 33 G. 3, c. 54, s. 10, meant a person who has taken the benefit of the Insolvent Debtors Act, and not merely one who had made an assignment of his effects for the benefit of his creditors,—upon which Baron Parke observed, "The natural import of the word 'insolvency' is a man unable to pay his debts, but in these statutes the context shows that the expression is used in its technical sense. Here, the term 'bankruptcy' is the only thing to indicate that 'insolvency' is not employed in its natural sense." Baron Parke subsequently observed that "a bankrupt, in the ordinary sense of the term, means a bankrupt according to law, but insolvency in its ordinary sense means no such thing." The Court decided in accordance with the opinion of Baron Parke.

In the case of *Biddlecombe v. Bond (a)*, the defendant gave a warrant of attorney, to secure the payment of a debt by instalments. An agreement was afterwards entered into, that the plaintiff should not enter up judgment unless the defendant should dispose of his business, "or become bankrupt or insolvent." It was decided that the expression, "become insolvent," means a general inability to pay debts, and does not signify taking the benefit of the Insolvent Debtors Act, unless the context so restrains it.

The argument of Counsel in that case was exactly the same as here. Counsel contended that the words are "bankrupt or insolvent, and this combination of expression gives a technical effect to the word insolvent. It must mean taking the benefit of the Act;" and Counsel referred to the case before Sir L. Shadwell, *In re Birmingham Benefit Society*, the case relied on in this case by Mr. F. Fitzgerald. Lord Denman, during the course of the argument

1864.  
Rolls.  
CASEY'S  
TRUSTS.  
Judgment.

(a) 4 Ad. & El. 332.

1854.  
*Rolls.*  
 CASEY'S  
 TRUSTS.  
 ———  
*Judgment.*

of Counsel, observed, "The opinion of Baron Parke, in *Parker v. Gossage*, was that the word 'insolvency' was to be interpreted as meaning general inability to pay, unless the context suggested a different interpretation; but you resort not to the context, but to the situation of the parties." In giving judgment, Lord Denman said:—"It is contended that the word 'insolvent,' as used in the agreement, must be restrained to such an insolvency as would be shown by the party taking the benefit of the Act for the Relief of Insolvent Debtors, inasmuch as the word occurs in company with bankrupt; we cannot so restrain it." Pattison, J., said, "I am of the same opinion. It would require a very strong case to show that the meaning of the word was restrained to taking the benefit of the Act. If the context does not show something to induce us to put such an interpretation on the word, we must hold it to be intended of a general inability to pay debts."

These cases appear entirely to sustain the Master's decision on the first point.

The second question which has been raised on the part of Eugene Sullivan and William James Shaw is, that the limitations in the marriage settlement, executed on the marriage of William Casey with his first wife, Margaret Murray, bearing date the 20th of July 1833, and the limitations in the marriage settlement of the said William Casey, executed on his second marriage with Esther Andrews, of the estate and interest of William Casey, in the annuities in the said settlement respectively mentioned, in the event of the said William Casey becoming bankrupt or insolvent, are invalid, it being contrary to law that a party should settle his own property, to go over in the event of his bankruptcy or insolvency.

There is no doubt, upon the authorities referred to, that if a party conveys his own property, as in the present case, to the use of or in trust for himself for life, and to go over in the event of his becoming bankrupt or insolvent, and that he becomes bankrupt, the limitation is void. It is considered a fraud upon the bankrupt law. No case has been referred to, in which the limitation has been held void against creditors, in the event of the settlor

becoming insolvent. There is a distinction in the cases of transfer made in contemplation of bankruptcy and insolvency.

1854.  
Rolls.  
CASEY'S  
TRUSTS.  
—  
Judgment.

Thus in the case of *Morgan v. Brudnell* (a), it was decided that a party who seeks to avoid a payment or transfer of goods, on the ground that it was voluntarily made by a trader, in contemplation of bankruptcy, must show not merely that the trader was insolvent when it was made, but also that he then contemplated bankruptcy. Mr. Justice Parke (now Baron Parke), in giving judgment in that case, said, "The meaning of those words (contemplation of bankruptcy) I take to be, that the payment or delivery must be with intent to defeat the general distribution of effects, which takes place under a commission of bankrupt. It is not sufficient that it should be made (as may be inferred from some of the late cases) in contemplation of insolvency. These cases, I think, have gone too far." Mr. Justice Pattison made observations to the same effect, and the case was decided accordingly.

Other cases might be referred to, which establish that transfers may be invalid, as contrary to the policy of the bankrupt laws, and yet not invalid in case of insolvency, unless so far as there may, in the recent Insolvent Acts, be express provisions on the subject. But it is not necessary to offer any opinion in this case whether such limitations as are contained in the two marriage settlements would be invalid against the assignees of William Casey, if he had been discharged as an insolvent debtor, or would be invalid if a creditor was to sue out execution. If such question arose, the case referred to in *Synge v. Synge* (b) would deserve consideration. The question in the present case is whether the limitations are invalid as against Mr. Eugene Sullivan and William James Shaw, claiming as trustees for creditors under the deed of the 24th of March 1848, in the report mentioned? If that deed is the ordinary deed for payment of creditors, I do not understand upon what legal ground I am to treat the limitations in the settlements as void as against such instrument. I have, however, been placed in much difficulty in this case, having heard no argument in support of the Master's report, or upon any of the questions raised by Mr. F. Fitzgerald. None of the cases which

(a) 5 B. & Ald. 289.

(b) *Ante*, 267.

1854.  
*Rolls.*  
CASEY'S  
TRUSTS.  
—  
*Judgment.*

I have cited in support of the report were referred to. If they had, Counsel in reply might have observed upon them.

The remaining question argued relates exclusively to the settlement of 1846; and it has been contended by Counsel for Mr. Eugene Sullivan and Mr. William James Shaw, that the failure, bankruptcy or insolvency contemplated by that settlement, was a failure, bankruptcy or insolvency, after the death of Alice Casey, who is entitled under the will of Thomas Casey, for her life, to the annuity, the subject of that settlement. I think the argument is not well founded.

A similar point was raised in a case not cited—*Jones v. Wyse* (a). Lord Langdale observed, "It was argued for the defendant, that whatever evidence of insolvency there might be, it related only to the time previous to the death of Mrs. Harper (the tenant for life); and that insolvency, previous to the time when the defendant was to have the actual enjoyment of the property, would not give effect to the limitation over. I think the argument is not sustained by the language of the settlement."

Upon the whole, I am of opinion that the Master's decision on the points raised by the objections was right, and I shall make no rule on the motion; and let £4 of the deposit be paid to the petitioner, and the rest of the deposit be returned.

(a) 2 Keen, 292.

1854.

*Rolls.*

WALCOTT v. CONDON, and several Matters.

June 12, 20.

Two receivers had been appointed in these cause and matters over different denominations of lands. In 1851, leases were made to Thomas Cahill and Michael Enraght, of certain portions of those lands for seven years, pending the cause and matters, from the 25th of March 1851. On the 21st of July, the lands over which the receivers were appointed were sold in the Incumbered Estates Court to Mr. Charles Patterson. On the 21st of October 1853, the purchase-money was lodged. On the 4th of March 1854, the Side-bar rule was entered, discharging the receiver, on the certificate of the Commissioners for the Sale of Incumbered Estates. Thomas Cahill gave up possession to the purchaser on the 4th of March—Michael Enraght on the 10th of March 1854.

According to the practice of the Incumbered Estates Court, the purchaser is entitled to the rents from the last gale day previous to the purchase, as the Commissioners charge the purchaser interest at £5 per cent. from the expiration of fourteen days from the day of purchase or confirmation of the sale; therefore where the sale took place on the 21st of July, the purchaser was declared entitled to the gale due on the 29th of September following, although he did not lodge his purchase-money until the 21st of October.

Mr. *Otway*, for the purchaser, moved that Thomas Cahill and Michael Enraght should pay to the said purchaser the half-year's rent of their respective holdings, which commenced the 25th of March 1853, and ended the 29th of September 1853, and the respective portions of the respective gales which accrued from the 29th of September 1853, to the times when they respectively gave up possession to the purchaser. He contended that, according to the practice in the Incumbered Estates Court, as certified in *Hoops v.*

After a receiver has been discharged, and the purchaser has gone into possession, the Court will not make an order that the tenants shall pay to the purchaser the rent which fell due prior to the discharge of the receiver; the receiver is to receive the arrear due prior to his being discharged, although the purchaser may be entitled to a portion of such arrear. The Court of Chancery does not order the tenant to pay such arrears to the purchaser.

The practice of the Court of Exchequer, as stated in *Jackson v. Jackson* (5 Ir. Eq. Rep.) and *Jameson v. Farrer* (3 Ir. Eq. Rep.) is not the practice of this Court. Form of order in such case.

The Side-bar Rule, discharging a receiver, on the certificate of a sale in the Incumbered Estates Court, does not operate as an absolute discharge. Although he cannot proceed against the lands for arrears of rent, he may proceed against the tenant by attachment or sequestration, on the Master's certificate, or by action in the name of the Master, where the tenant holds by lease under the Court, for the arrears due when the receiver was discharged.

1854.  
Rolls.  
WALCOTT  
v.  
CONDON.  
Argument.

*Lord Kingston* (a), the purchaser was entitled to the gale which accrued next after the confirmation of the sale, although he did not lodge his purchase-money when it accrued, as he was charged interest on the purchase-money from the period of fourteen days from the sale. As to the regularity of the order sought, he cited *Jackson v. Jackson* (b); *Jameson v. Farrer* (c); *Lalor v. Netterville* (d).

Mr. *Trevor*, for the tenant Michael Enraght, contended that the practice of the Court of Exchequer, in the cases of *Jackson v. Jackson* and *Jameson v. Farrer*, had not been the practice of the Court of Chancery. That the Court had no jurisdiction, on the application of a third person, to make an order on a tenant to pay a gale which accrued due after the lands had been sold, or to make an apportionment of rent in a case which was not within the Apportionment Statutes. After the purchaser has obtained possession of the estate, the jurisdiction of the Court over it altogether terminates, and it cannot afterwards authorise any interference with the receipt of the rents or the management of the estate: *Dobbs on Judicial Sales*, p. 97.

Mr. *D. Sherlock*, for Evans, one of the receivers.

THE MASTER OF THE ROLLS.

June 20.  
Judgment.

A motion has been made in this cause and the several matters, on the part of Charles Patterson, Esq., that Thomas Cahill (late a tenant of part of the lands over which the receiver was appointed, and who held under a lease for years pending the first cause and first matter), and Michael Enraght (late a tenant to another portion of the lands over which the receiver was appointed, and who held under a lease for a term of seven years pending the other matters), should pay to Charles Patterson, Esq., who has purchased the lands in the Incumbered Estates Court, the half-year's rent of their respective holdings, which commenced on the 25th of March 1853, and ended the 29th of September 1853; and that said tenants should also pay to the said Charles Patterson the

(a) 5 Ir. Jur. 221.

(b) 5 Ir. Eq. Rep. 591.

(c) 3 Ir. Eq. Rep. 513.

(d) 6 Ir. Jur. 261.

respective portions of the respective gales, which accrued from the 29th of September 1853, to the time when they respectively gave up possession to Mr. Charles Patterson.

There were two receivers in the cause and matters—the one over one portion of the lands, and the other over another portion. The facts of the case are as follow :—

In the year 1851, leases were made to Thomas Cahill and Michael Enraght respectively, of certain lands over which the receiver was appointed. The leases were for seven years, pending the cause and matters.

On the 21st of July 1853, the lands were sold in the Incumbered Estates Court, to Mr. Charles Patterson. It does not appear when the sale was confirmed; but I presume it was confirmed shortly after. I should wish, however, before giving in the order in this case, to be informed on what day the sale was confirmed. On the 21st of October 1853, the purchase-money was lodged in that Court. On the 25th of February 1854, the conveyance to the purchaser was executed.

Thomas Cahill delivered up possession to Mr. Charles Patterson on the 4th of March 1854, and Michael Enraght delivered up possession on the 10th of March 1854. According to the practice of the Court of Chancery, Mr. Patterson would not have been entitled to the gale which fell due on the 29th of September 1853, as the purchase-money was not lodged until the 21st of October in that year. It appears, however, that by the practice of the Incumbered Estates Court, interest is charged on the purchase-money from fourteen days after the sale; and it is, therefore, considered in that Court, that the purchaser is entitled to the rents from the gale day previous to the purchase, although the purchase-money may not have been lodged until after the following gale day. What the rule would be if the gale was to fall due after the sale and before the confirmation of the sale, or within the fourteen days during which no interest is payable, does not appear. The principle of the rule of the Incumbered Estates Court appears to be, that as interest is charged on the purchase-money, the payment is considered to have been made at the time from which the interest is charged; and it is

1854.  
*Rolls.*  
WALCOTT  
v.  
CONDON.  
*Judgment.*

1854.  
*Rolls.*  
 WALCOTT  
 v.  
 CONDON.  
*Judgment.*

no doubt reasonable that the purchaser should have the rents, where he pays interest. But suppose the purchase was made on the 22nd of September, the interest would only be payable from the 6th of October; and in such case a question might arise, as to whether the purchaser ought to have the rents which fell due on the 29th of September, where the interest on the purchase-money did not commence to run until after that day. It is not necessary, however, to offer any opinion on that question in the present case.

In the case of *Hoops v. Lord Kingston*, which was before the Court in Easter Term 1853, I submitted the following query to the Incumbered Estates Court:—

“In this case it has been stated that John Sadleir, Esquire, became the purchaser of certain lands in the Incumbered Estates Court, on the 1st of July 1851—that he did not lodge the purchase-money until July 1852; and, it is said, he was then obliged by the Incumbered Estates Court to pay, and did pay, the purchase-money, with interest at £5 per cent., from July 1851 to July 1852; and that by the practice of the Incumbered Estates Court, interest is charged on the purchase-money, if not lodged within fourteen days after the sale. The MASTER OF THE ROLLS will be much obliged to the Incumbered Estates Commissioners to let him know whether the facts herein detailed have been correctly stated.”

The following answer was sent to me by Mr. Carey, the secretary to the Commissioners:—

“The facts, as stated in the annexed paper (*i.e.*, the paper I have just read), are correct; and the practice of the Commissioners is to charge the purchaser interest at the rate of £5 per cent. from the expiration of fourteen clear days from the day of purchase or confirmation of sale. The purchaser is entitled to the rents from the last gale day previous to the purchase. “HENRY CAREY.”

It would, therefore, appear that Mr. Charles Patterson is entitled to the rents which fell due on the 29th of September 1853, although he did not lodge his purchase-money until the 21st of October 1853.

The question however arises, whether I should make an order that Thomas Cahill and Michael Enraght should pay the rents which fell due in September 1853, and the apportionment claimed

up to the 6th and 10th of March respectively, to the purchaser. The case relied on, in support of the motion, is a case in the Court of Exchequer, *Jackson v. Jackson* (a). No similar application having ever been made at the Rolls, during my time, I have made inquiry whether any such order was made by any of my predecessors, and what the practice was in the time of Sir W. M'Mahon, Sir M. O'Loughlen and Mr. Blackburne. I have received the following reply from Henry Darley, Esq., Clerk in Court, whose knowledge of the practice of the Court of Chancery is so well known.

1854.  
Rolls.  
WALCOTT  
v.  
CONDON.  
Judgment.

“ Court of Chancery, 15th of June 1854.

“ WALCOTT v. CONDON.

“In reply to your queries in the above case, first, whether the discharge of the receiver by the usual side-bar order, entered on the certificate of the Incumbered Estates Commissioners, discharges the receiver absolutely, so as to preclude him from recovering the arrears due prior to the conveyance to the purchaser, I have to state that I do not think it does. You will perceive from the form of the order (a copy of which I inclose), that it does not operate as a general discharge, but merely discharges him from off the lands sold. It differs in this respect from the usual order of the Court, discharging a receiver on passing his final account, and whose functions are at an end, the form of such an order (a draft of which I also inclose) being general; but in the former case, a further order of the Court is evidently necessary, the receiver having to account for the rents, as well those belonging to the parties as those belonging to the purchaser.

“I think it right to state that prior to the adoption of the practice of discharging a receiver, on a certificate from the Incumbered Estates Court, Mr. Flanagan spoke to me on the subject, and I believe the order was framed in its present form to avoid the difficulties that would arise in almost every case, if it was held that the receiver could not afterwards collect any arrears that became due prior to the execution of the deed to the purchaser.

“As to the second question, ‘whether the purchaser can sustain

(a) 5 Ir. Eq. Rep. 501.

1854.  
*Rolls.*  
 WALCOTT  
*v.*  
 CONDON  
*Judgment.*

a motion that the tenants should pay him the rent to which he may be entitled, and which accrued due prior to the date of his conveyance?' I can only state that during the twenty years I sat in the Rolls Court, I never knew such an order to have been made. I find in the case of *Jackson v. Jackson* (a), that Baron Pennefather states that such an order is unobjectionable in point of form. I therefore give no opinion on that point, but merely state that I never knew such an order to have been made by the Rolls Court. However, *Jackson v. Jackson* was a peculiar case. The receiver had been absolutely discharged, and the lands were sold out of Court by agreement of the parties; and it was further agreed that the tenants should pay the purchaser the proportion of their rents payable by them from last gale day, to the time when possession should be given to him, and the respondent had executed a power of attorney to the purchaser, authorising him to receive those rents, and of which arrangement the tenants were aware.

"I need scarcely add that the receiver cannot have any remedy against the lands after he is discharged from off them, and the purchaser put into possession; but his only remedy is against the person of the tenant by attachment, or against his property by means of a sequestration, which issues, as of course, on a certificate of the Master."

In addition to the remedies mentioned by Mr. Darley, an action might be maintained in the name of the Master by whom the lease was executed.

In *Ponsonby v. Ponsonby* (b), Sir William M'Mahon said:—"The injunction to put the purchaser into possession is *ipso facto* a discharge of the order appointing the receiver over the lands, and the Court can only proceed by attachment for the arrears due by the tenants at the time the injunction issued."

The proper form of order discharging the receiver, where the sale is in the Court of Chancery, is as follows:—

"Declare A B the purchaser of the lands of Whiteacre, entitled to the rents of said lands, which accrued due from the 1st day of May 1853, being the gale day next prior to the lodgment of the

(a) 5 Ir. Eq. Rep. 591.

(b) 1 Hog. 321.

remaining three-fourths of the purchase money, and let the receiver proceed to pass his final account in this cause; and let the Master, in passing such account, ascertain what portion of the rents received by him are the property of the purchaser, having regard to the declaration hereby made; and let the receiver pay over to the purchaser such sum as the Master may certify; and let him pay and lodge his balance in such manner and within such time as the Master may direct; and thereupon let him be discharged; and on producing to the Clerk of the Recognizances the receipt of the purchaser, as also the receipt for the payment of the residue of his balance, pursuant to the Master's direction, let his recognizance be vacated."

On the 18th of June 1850, the Lord Chancellor made a General Order, "that the rules set forth in the schedule hereto shall be side-bar rules of the Court, to be entered and obtained as prescribed in the 4th of the General Orders of the 27th of March 1843 (1), to receive the certificate of the Commissioners for the Sale of Incumbered Estates in Ireland, of the sale and conveyance to the purchaser of any lands over which a receiver has been appointed, and to discharge the receiver as to the lands mentioned in the certificate."

The following is a copy of the form of the side-bar order:—

"In Chancery, the — day of — between A B, plaintiff, and C D, defendant.

"Upon motion of Mr. G H, solicitor for J S, a purchaser, and on reading the certificate of the Commissioners for the Sale of Incumbered Estates in Ireland, bearing date the — day of — 18— made in the matter of the estate of L M, owner, *ex parte* N O, petitioner; whereby the said Commissioners certify that they have sold, and by the conveyance under their seal, bearing date the — day of — 18—, have granted to J S, Esq., all that and those the lands of Blackacre, &c. It is ordered by the Court, that the said certificate be, and the same is, hereby received; and accordingly that R T, Esq., the receiver in this cause, be, and he is, hereby, discharged from off the said lands and premises, sold and conveyed by the said Commissioners unto the said J S, Esq., as purchaser thereof."

1854.  
Rolls.  
WALCOTT  
v.  
CONDON.  
Judgment.

1854.  
*Rolls.*  
 WALCOTT  
*v.*  
 CONDON.  
*Judgment.*

It will thus be observed, as adverted to by Mr. Darley, that the discharge of the receiver by the side-bar order is not general; it is only a discharge from and off the lands, and has the effect which Sir W. M'Mahon attributes to the injunction to put a purchaser into possession, which precludes the receiver from proceeding by distress, or in any other manner, as against the lands, but leaves him undischarged, so far as may be necessary to recover arrears by a personal remedy against the tenants.

The proper form of order, therefore, in the present case, will not be to direct the tenants to pay to the purchaser, such an order never hitherto having been made in this Court; but I shall make the following order, which will answer the object of the purchaser, and is in accordance with the practice of the Court.

The Court doth declare that Charles Patterson, Esq., the purchaser in the Incumbered Estates Court, is entitled to the rents of the lands from which the two receivers were discharged by the side-bar order of the 4th of March 1854, which accrued due after the 25th of March 1853, being the gale day next prior to the purchase in the Incumbered Estates Court; and let the said receivers respectively proceed to pass their final accounts in these causes and matters; and let the Master, in passing such accounts, ascertain what portion of the rents, if any, received by them respectively, are the property of the said purchaser, having regard to the declaration hereby made; and let the said receivers pay over to the purchaser such sums, if any, as the Master may certify; and let the said receivers pay or lodge their respective balances, if any, in such manner and within such time as the Master shall direct, and thereupon let them be discharged; and on producing to the Clerk of the Recognizances the receipt of the purchaser, as also the receipts for payment of the residue of their respective balances, pursuant to the Master's directions, let the recognizances of said receivers and their sureties, &c., be vacated, &c.; and let the said Charles Patterson have notice of the passing of the said receivers' accounts, and let the receiver, Edward Galway, pay to the said Charles Patterson £5 for

the costs of this motion, and have credit for such payment; and let William Evans, one of the receivers, and who appears on this motion, have £5 for the costs of appearing on this motion, as part of his costs in the cause and matters; and let the tenants abide their own costs of appearing on this motion.

1854.  
Rolls.  
WALCOTT  
v.  
CONDON.  
Judgment.

O'GRADY v. BRADY.

May 3, 26.

THE facts of this case, and the propositions contended for by the Counsel for the parties, sufficiently appear in the judgment.

Mr. *Hughes* and Mr. *Deasy*, for the plaintiff, cited *Law v. Warren (a)*; *Phillips v. Eastwood (b)*.

Lands were, by a marriage settlement of 1801, conveyed to trustees, in trust, for C., the intended wife, for life, remainder to B., the intended husband, for

life, remainder in trust for the younger children of the marriage, with a power to the trustees to sell the lands, and lay out the produce in the purchase of other lands, in fee or in Government securities. There was one younger child of the marriage, K. The trustees sold the lands, and lent a portion of the purchase-money to B, on the security of his bond and warrant, and a policy of insurance on his life, which was effected by the trustees. By a deed of 1832, to which neither K. nor her trustees were parties, B. and his eldest son R. conveyed other estates, of which B. was tenant for life, with remainder to R. in tail, to the use of a trustee for 500 years, to raise by mortgage a sum of £16,000, to pay off incumbrances; and after reciting that bonuses had accrued on the policy of insurance to the amount of £2500, and that B. had agreed, in order to indemnify R.'s estate, to assign to the trustee of the term all his interest in the policy of insurance, and all bonuses thereon, B. assigned all his interest in the said policy of insurance, &c., in trust, to apply the produce thereof in payment or part payment of the sum of £16,000, intended to be borrowed. The £16,000 was, in 1834, raised by mortgage of the term, without referring to the policy or indemnity clause in the deed of 1834. By deeds of 1889 and 1843, the surviving trustee of the deed of 1801 assigned the judgment and the policy of insurance to R., as a new trustee, on the trusts of the deed of 1801; and C. and K. accepted the judgment and policy as a proper investment of the trust fund. Further bonuses afterwards accrued on the policy.—*Held*, that the mortgagees were not entitled to the bonuses, under the indemnity clause of the deed of 1832.

*Quere*—Whether K. was entitled to the bonuses, as against R?

A person who was properly an answering party in a cause, and is made a notice party, is not bound by the proceedings. Therefore, where a consent was signed by a solicitor as solicitor for and on behalf of the plaintiff, and such solicitor happened to be the general solicitor of a person so circumstanced, it was *Held* that she was not bound by the consent, which did not purport to be signed on her behalf.

*Held*, that the deed of 1832, though not binding on K., might be read as evidence of the title of the mortgagees.

(a) 6 Ir. Eq. Rep. 299.

(b) Ll. & G., *temp. Sug.*, 291.

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Mr. F. Fitzgerald and Mr. Tuthill, for Katherine Blackwood, cited *Trafford v. Boehn* (a); *Fuller v. Knight* (b); *Montford v. Lord Cadogan* (c); *Blackwood v. Burrowes* (d); *Docker v. Somes* (e).

Argument.

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#### THE MASTER OF THE ROLLS.

This case comes before the Court on objections to the report of William Brooke, Esq., filed the 16th of March 1854.

An order was made in these causes, bearing date the 3rd of February 1853, whereby it was referred to the Master to inquire and report who were the several persons interested in or entitled to the sum of £6127. 10s. 9d., Government £3½ per cent. stock, and £99. 11s. 6d. cash in the Bank of Ireland, to the credit of these causes, "and the separate credit of policy of Equitable Insurance Company;" and that he should allocate same amongst the persons entitled thereto.

The Master has, by his report, allocated to the Rev. Richard Johnstone, whose claim is undisputed, £967. 16s. 8d. of said Government stock, being the amount of premiums paid by the receiver on the policy of insurance. It has not been explained how the Rev. Mr. Johnstone is entitled to be repaid the premiums on the policy paid by the receiver; but as no question has been raised to Mr. Johnstone's claim, this is not material. The Master, however, has further found that Miss Katherine Blackwood is entitled to the residue of the said stock, amounting to £5159. 14s. 1d.; and it is upon that finding that the questions arise.

The plaintiffs have taken objections to the Master's report, on the ground of the rejection of evidence tendered to him on the part of the plaintiffs, and on the ground that the said balance of £5159. 14s. 1d., except a certain sum of £362. 10s. 9d., the particulars of which are mentioned in the objections, should have been allocated to the plaintiffs. In strictness, perhaps, the Master should have allowed the documents to be read, as they are the instruments

(a) 3 Atk. 448.

(b) 6 Beav. 205.

(c) 17 Ves. 485.

(d) 4 Dr. & War. 441.

(e) 2 M. & K. 655.

under which the plaintiffs deduce their alleged title; but what the Master probably intended was, to reject the instruments and the recitals therein, as evidence to affect Katherine Blackwood's right. I have permitted the rejected documents to be read, although I have not thereby decided that any of the provisions therein contained affect Miss Blackwood.

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The facts of the case are as follow:—By indenture, bearing date the 21st of November 1801, made between Patrick Richard Blackwood Brady (whom I shall hereafter call Mr. Brady), of the first part; Mary Blackwood, widow, the mother of said Mr. Brady, of the second part; Samuel Madden and Catherine Madden his daughter, of the third part; and the Rev. Dudley Charles Ryder, the grandfather of Catherine Madden, of the fourth part; and James Blackwood and Charles Powell Leslie, of the fifth part (being the marriage articles executed on the marriage of Mr. Brady with Miss Madden): after reciting that the said Catherine Madden was seised in her own right of certain lands in Leicestershire, it was witnessed, that as soon as she should come of age, she should convey to the said trustees, James Blackwood and Charles Powell Leslie, and their heirs, all her estate and interest in said lands, on trust, for herself for life, and after her death to Mr. Brady for life, if he should survive her; and from and after the death of the survivor, in trust for the younger children of the said intended marriage, whether sons or daughters, and their heirs, equally to be divided between them, if more than one; and in case there should not be any younger child of the said marriage who should attain twenty-one, then the lands were to revert to the use of the said Catherine Madden and her heirs, for ever. The deed then contained a power of sale to the trustees to sell the said lands, or any part thereof, with the consent of Mr. Brady and Catherine Madden, under their hands and seals, “and lay out the money to arise from such sale or sales in the purchase of lands in fee-simple in Ireland, or on Government securities, at the election of the said P. R. B. Brady and Catherine Madden, or the survivor, and which purchased lands or money to be so lent on Government securities are to be subject to the same trusts, and go and be paid to such person and persons

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as are hereinbefore mentioned and specified, with respect to the lands, &c., in Great Britain, in case the same had not been sold; and such securities, if taken, to be deemed and considered as land, and go accordingly."

The marriage between Mr. Brady and Miss Madden took place immediately on the execution of the articles, and there were issue two children, viz., a son, Richard Blackwood Brady, now called Richard Blackwood, and Katherine Blackwood, who was the only younger child, and entitled therefore, under the articles, to the Leicestershire estates after the death of her father and mother; or in case of the sale of any part thereof, under the said power of sale, to the purchase-money. The marriage articles were carried into effect by a settlement executed on the 20th of November 1804, in which settlement there were the same trustees, James Blackwood and Charles Powell Leslie.

Previous to 1813, a large portion of the Leicestershire estates were sold, and a portion of the purchase-money, £6332, was thus disposed of. £3000 was lent in July 1813 to Mr. Latouche, of Harristown, on his bond and warrant, and judgment was entered thereon, in Easter Term 1817, in the name of the said trustees. The residue of the £6332 was lent by the trustees to the petitioner, Richard Blackwood Brady, and an insurance was effected on his life, on the 10th of November 1813, by the said trustees, with the Equitable Insurance Company, for a sum of £3000 British.

On the 15th of August 1814, Mr. Brady executed to the trustees a bond and warrant in double the amount of the sum lent; and in Easter Term 1820, judgment was entered on the warrant, at the suit of the said trustees, against Mr. Brady. It will be observed that the whole of these transactions, in relation to the loan of the £6332, was a breach of trust, as the power in the marriage articles and the settlement only authorised the trustees to lay out the produce of the sales of the Leicestershire estates in lands or Government securities.

Mr. C. P. Leslie, one of the trustees in the articles of 1801, and in the settlement of 1804, died in 1830, leaving his co-trustee, Mr. James Blackwood, him surviving.

With respect to the sum of £3000 lent to Mr. Latouche, of Har-  
rystown, no question arises on that, the breach of trust having been  
released by the deed of 1839, hereinafter mentioned. The question  
which arises is in respect of the sum lent to Mr. Brady by the trus-  
tees, and the policy of insurance effected to secure the said sum so  
lent. The amount of the policy for £3000, effected on the life of Mr.  
Brady with the Equitable Insurance Company, has been lodged in  
Court, and the amount of the bonuses on said policy are so con-  
siderable, that the sum in Court to the separate credit of the policy  
of the Equitable Insurance Company is £6127. 10s. 9d., Govern-  
ment stock.

The sum allocated to the Rev. Mr. Johnstone is, as I have  
already stated, in respect of premiums paid by the receiver on the  
policy. With respect to the balance of £5159. 14s. 1d., the plaintiffs  
insist that the entire claim of Miss Katherine Blackwood, on foot  
of the bond of her father, has been paid, except £76. 12s. 3d.;  
that she paid premiums on the policy to the amount of £175.  
6s.; and that those two sums, with interest, are all that  
remain due to her, making together £362. 10s. 9d., calculated in  
the manner stated in the fourth objection. Miss Katherine Black-  
wood, by her Counsel, insists that the plaintiffs have no claim to the  
bonuses—first, because Miss Katherine Blackwood was at liberty,  
if she thought fit, to adopt the breach of trust by the trustees, and  
to elect to take the several securities upon which the trust fund  
was invested, and to waive her rights to proceed against the  
trustees for the breach of trust; secondly, that whatever rights her  
brother Mr. Richard Blackwood might have had, if he had made  
any claim before the Master, the plaintiffs have no title to any part  
of the fund in Court. With respect to the first ground relied on by  
Counsel for Miss Katherine Blackwood, Lord St. Leonards appears  
to have been of opinion, when the case was before him, that she  
would be entitled to the bonuses. In the case of *Blackwood v.*  
*Burrowes* (a), his Lordship said:—"It does not appear that the  
plaintiff (Katherine Blackwood), called in the report in that case  
Katherine Brady, has any great reason to complain: one of the

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(a) 4 Dr. & War. 476.

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securities is represented to be most desirable—the debtor being a gentleman of considerable property, and the other is secured by a policy of insurance, upon which several bonuses have been declared, exceeding considerably the sum intended to be insured. It is stated that the Insurance Company would at present give a sum of £4000 for the policy, and if the plaintiff chooses to keep the policy on foot, the sum she will receive must be much larger.”

The first question has been argued by Counsel for the plaintiffs, and for Miss Katherine Blackwood, at considerable length, and is of much importance; but according to the view I take of the second question raised, it is unnecessary that I should offer any opinion on the first, as I consider that whatever difficulty might arise if the question had been between Miss Katherine Blackwood and her brother Mr. Richard Blackwood, the plaintiffs have entirely failed to show that they have any title to the fund in Court, or any part thereof; and if they have no title, it is quite unnecessary that I should offer any opinion as to the question which might have arisen between Miss K. Blackwood and her brother, if he had taken objections to the report.

It is now necessary that I should state the facts of the case which the plaintiffs rely on as establishing their claim to the greater part of the amount of the policy.

Previously to the month of November 1832, Mr. Richard Blackwood came of age; and on the 21st of November 1832, a deed was executed by Mr. Brady, of the first part, Mr. Richard Blackwood, his only son, of the second part, George Marshall Knipe, of the third part, and Thomas Burrowes of the fourth part. That deed was rejected by the Master; and the recitals, I apprehend, are not evidence against Miss Katherine Blackwood, but the deed, as part of the deduction of the plaintiffs' alleged title, is evidence.

That deed was a re-settlement of the Brady estates in the county of Cavan, which had been settled in strict settlement by the articles of 1801 and the settlement of 1804. A recovery was suffered by Mr. Brady and his son, to the uses of the deed of the 21st of November 1832. By that deed, Mr. Brady and his son, Mr. Richard Blackwood, conveyed the Cavan estates to Mr. Burrowes,

subject to certain charges therein mentioned, to the use of George Marshall Knipe, for 500 years, and subject to said term, on trust, that Mr. Burrowes should, out of the rents and profits, keep down the interest of a sum of £16,000 hereinafter mentioned, which was to be raised by mortgage of said trust term of 500 years, and to pay the premiums on certain policies of insurance, and to pay an annuity of £200 a-year to Richard Blackwood; and subject to the said term of 500 years, and to said charges, to the use of Mr. Brady for life, remainder to the said Mr. Richard Blackwood for life, remainder to his first and other sons in tail male, with remainder to Mr. Brady in fee. The deed then recites the several incumbrances affecting the lands, and particularly certain annuities on the life of Mr. Brady, which were redeemable, and that the sum necessary to be borrowed to redeem the annuities and to pay off the charges therein recited amounted to £16,000; and then the deed contains the following recital:—"And whereas Charles Powell Leslie and James Blackwood, the trustees named in the settlement of the 20th of November 1804, heretofore effected an insurance on the life of P. R. B. Brady, with the Equitable Insurance Company of London, to secure a sum of £3000, late currency; and whereas the said trustees effected said insurance for the sum of £3000, British currency, and the said P. R. B. Brady will be entitled to the difference between English and Irish currency on said sum of £3000, and also to any dividends, bonuses or increase heretofore accrued, or that may hereafter accrue or become due for or in respect of said policy; and whereas the several bonuses and increase on said policy, beyond the said sum of £3000, late Irish currency, including the difference between English and Irish currency on the sum insured, amount to the sum of £2500, British currency." And after reciting a further policy for £3000 effected by Mr. Brady on his life with said Company, and that for the purpose of redeeming and paying off charges, Mr. Brady and Mr. Blackwood had agreed "to borrow, on mortgage of the said several lands and premises, a sum of £16,000, British currency, at an interest of £5 per cent. per annum, and therewith to pay off and discharge the said several

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principal sums hereinbefore mentioned; and whereas in order that the said Richard Blackwood, or the said estates to which he will be entitled on his father's decease, shall not, by his joining the said P. R. B. Brady, his father, in securing on the said lands and premises the said sum of £16,000, and interest thereon, sustain any loss, the said P. R. B. Brady hath agreed to assign and make over to the said George Marshall Knipe, his executors, &c., the said policy of insurance for securing £3000, so effected by him on his life, with the aforesaid Equitable Insurance Company, and all his estate, right, title and interest therein or thereout, and also to assign and make over to him (George M. Knipe) the said sum of £2500, to which he is now entitled by the difference of currency, as aforesaid, and all bonuses and increase on said policy so effected by the said Charles Powell Leslie and James Blackwood, as aforesaid, with said Company, and all sums of money, dividends and increase which may arise or grow due to him by virtue of said policies of insurance with said Company." And after such recitals, and some other recitals, the said P. R. B. Brady assigned said policies and bonuses, &c., to George Marshall Knipe, upon trust, that he should, after the death of the said Mr. Brady, call in and receive the amount of such policies, bonuses, &c., on trust, to apply the same, subject to the expenses therein mentioned, in payment or part payment of the said sum of £16,000, intended to be borrowed and taken up at interest.

The trusts of the term of 500 years are then declared (amongst other matters) to be on trust, the better to secure the said sum of £16,000, so intended to be borrowed and secured by mortgage as aforesaid.

On the 20th of December 1834, the said sum of £16,000 was raised by a mortgage of the said Cavan estates, to Mr. Nicholson, of Balrath; but the mortgage is simply a mortgage of the said lands, and there is no recital in the mortgage deed referring to the indemnity clause in the deed of the 20th of November 1832, or to the policy of insurance or bonuses; and the policy of insurance or bonuses were not assigned, and were not part of the security on which the £16,000 was advanced.

The mortgage of 1834 was assigned to the plaintiffs on the 2nd of August 1839; and the plaintiffs now contend, although the mortgage under which they claim contains no reference, directly or indirectly, to the indemnity clause in the deed of the 20th of November 1832, or to the policy, or to the bonuses, that, as it is probable that the lands mortgaged to them, when sold, will not produce sufficient to pay off their mortgage, they are entitled to the benefit of the indemnity clause, contained in the deed of November 1832, although Mr. Nicholson lent his money solely on the security of the lands, and not on the security of the policies, which were not assigned or referred to by the deed of mortgage, of the 20th of December 1834. This is quite a novel doctrine, that a third person, who is a stranger to a deed, may enforce the performance of a contract of indemnity between the parties to the deed, not in any manner intended for the benefit of such third person. Such a doctrine is contrary both to principle and authority (a).

The next deed of importance is a deed of the 15th of July 1839, executed between James Blackwood, the surviving trustee of the articles of 1801, and the settlement of 1804, of the first part; Patrick Richard Blackwood Brady and Katherine Blackwood Brady, otherwise Madden, his wife, of the second part; Katherine Blackwood of the third part, and the Rev. Silver Oliver, of the fourth part. That deed recites the marriage articles of 1801, also the settlement of 1804, and recites that Miss Katherine Blackwood, the only younger child of the marriage, was, amongst other things, entitled to the properties situate in Leicestershire, or to the produce arising from the sales thereof, subject to the life estates of her father and mother in the same, and recites that the said James Blackwood and Charles Powell Leslie (deceased), the trustees in said articles and settlements, had lent and advanced, out of the money arising from the sales of said estates in the county of Leicester, the sum of £3332, late Irish currency, to the said Patrick Richard Blackwood Brady, on "the security of a bond of the said P. R. B. Brady, with warrant of attorney for confessing judgment thereon, and of a

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(a) See *Colyear v. Countess of Mulgrave* (2 Keen, 81).

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certain policy or instrument of insurance, bearing date the 10th of November 1813, effected by them on the life of the said P. R. B. Brady, with the Equitable Insurance Company;" and after reciting the loan to Mr. Latouche of Harristown, and that Charles P. Leslie, the co-trustee of James Blackwood, was dead, and that Miss Katherine Blackwood attained her age in 1827, and reciting that the trust fund lent to Mr. Latouche of Harristown, and to Mr. P. R. B. Brady, should in strictness have been invested in land or Government securities, and reciting that in order to put an end to expense and litigation respecting the said sum so due to James Blackwood, and to divest him of all liability from any loss which might result from his or his co-trustees' dealings with the trust funds, and reciting that he had agreed, for the considerations in the deed mentioned, and amongst others, that Mrs. Brady and Miss K. Blackwood would release him from all responsibility, by reason of his having dealt as aforesaid with said trust funds; "and in order to induce the said Katherine Blackwood Brady and Katherine Blackwood to relieve the said James Blackwood from such liability, and to adopt and accept the aforesaid judgments (*i. e.*, the judgments against Mr. Latouche of Harristown, and Mr. P. R. B. Brady), obtained by the said James Blackwood and Charles Powell Leslie, as proper and satisfactory investments of the trust moneys lent to those persons respectively; the said R. P. B. Brady hath proposed and agreed to assign to the said Silver Oliver" his life interest in a certain security therein mentioned; and after some further recitals, the said James Blackwood assigned all that and those the said policy of insurance and said judgments to Silver Oliver, to hold and take the said judgments and policy of insurance, and all moneys due thereon, and every part and portion of same respectively, unto the said Silver Oliver, his executors, administrators and assigns, as and for his and their own proper moneys, goods and chattels for ever. And by a further passage in said deed, it is witnessed that said policy has been assigned for the uses and purposes stated in said indenture, concerning the English properties of the said Mrs. Brady, or as near thereto as circumstances will admit, &c.; in other words, for Miss Katherine Blackwood, after the

death of her father and mother. And the deed further witnessed, that in consideration of the transfer and assignment thereby made by the said James Blackwood, and the other considerations therein mentioned, Mr. and Mrs. Brady and their said daughter Miss Katherine Blackwood accepted and adopted the said two judgments as proper and satisfactory investments of said trust funds; and then follows a release to Mr. James Blackwood.

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That deed not having been executed by Silver Oliver, a further deed was indorsed thereon, dated the 20th of September 1843, by which Richard Blackwood was appointed trustee of the deed of 1839, in place of Silver Oliver, and Richard Blackwood executed that deed, and accepted the trusts; and thus Mr. Brady and his son Richard Blackwood expressly assented to James Blackwood, in whom the policy was vested, assigning same for the absolute and exclusive benefit of Katherine Blackwood; and unless the plaintiffs had some rights under the deed of 1832, which I am clearly of opinion they had not, their rights under the mortgage deed of 1834 being only to the lands, it was, of course, impossible for the father or the son to execute any instrument subsequent to the 26th of September 1843, depriving Miss Katherine Blackwood of her rights under the deed of 1839, and the indorsement of 1843, without her express consent.

In the year 1840 (15th July), the bill was filed to foreclose the mortgage. Miss Katherine Blackwood was no party to the suit. On the 2nd of May 1842, there was a decree to account. On the 24th of February 1843, a receiver was appointed; and I may here observe that there is no evidence by whom the premiums of the policy were paid up to 1841, although it is probable they were paid off by Mr. Brady. From 1841 to 1843, the premiums were paid by Miss Katherine Blackwood; from 1844, they were paid by the receiver, under the consent order hereinafter mentioned. The Master made his report in November 1843, and in the following December a sale of the mortgaged lands was made.

On the 20th of February 1844, a supplemental bill was filed, to bind certain persons, not parties to the original bill, and Katherine Blackwood was made a notice party to the supplemental suit. On

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the 3rd of July 1844, there was a decree in the supplemental suit. It will be kept in mind that Miss Katherine Brady, being only a notice party, was in no way bound by the proceedings in the cause, so far as she had any rights to the policy of insurance, or the bonuses accrued thereon. A person made a notice party, who is not properly a mere notice party, is in no way affected by the proceedings: *Boreham v. Bagnal* (a).

If the plaintiffs intended to bind Miss Katherine Blackwood by the proceedings in the cause, or to make a case that although the policy was not mortgaged to Mr. Nicholson, they had a right, as his assignees, to the benefit of the indemnity clause, contained in the deed of November 1832, they should have made that case by their original or supplemental bill, and made Miss Katherine Blackwood an answering party; but it is idle to say, there being nothing put in issue, in either the original or supplemental bills, to affect her rights, and nothing in the decree in the original or supplemental suit relating to the policy of insurance—that she, as a notice party, is to be affected by every irregular proceeding or consent entered into in the cause. On the 21st of November 1844, a consent was entered into in the cause, which was made a rule of Court, and which was signed by Frederick Jackson, as solicitor for the plaintiffs; and it is suggested, on the part of the plaintiffs, that it is binding on her, because Mr. Jackson was, as it is alleged, her solicitor in 1841, 1842 and 1843. But whether he was or was not her general solicitor in those years, he was not her solicitor in the cause, she being no party in the cause; and he did not purport to sign the consent on her part, which, upon the facts of this case, it would have been highly improper for him to have done: and I am clearly of opinion, that the consent was in no way binding on her.

That consent, after providing that the receiver should pay the premiums on the policy of insurance in question, and stating that a bonus had been declared thereon, proceeds thus:—"Which bonus hath been, by an indenture dated the 21st of November 1832, assigned for the benefit of the persons in remainder to

(a) 4 Hare, 608.

estates over which such receiver hath been appointed after the death of said R. P. B. Brady, such payment by such receiver to be without prejudice to the liability of the person entitled to the said insurance being subject to the same; and it is further consented and agreed, that it be referred to J. S. Townsend, Esq., the Master in this cause, to inquire and report whether or not such bonus is well and duly assigned for the purposes aforesaid, or whether any, and if so what, further assignment is necessary so to vest the same; and thereupon, that the receiver do, without further order, procure the execution of such deed (if any) as the Master shall approve of for that purpose, and take credit for the expenses thereof, and of such reference, on passing his account."

The plaintiffs allege, that under that consent order a deed was approved of by the Master, bearing date the 5th of July 1845, which, however, does not appear to be initialled by Master Townsend, and which was not in his office; and considering the circumstances connected with Master Townsend's office, in the year 1845, the Court can scarcely be called on to presume any thing. The deed was amongst the papers of the plaintiffs' late solicitor, Mr. Frederick Jackson, who, I understand, is dead, and the deed is now lodged in Master Brooke's office.

The plaintiffs, however, rely on a ruling in Master Townsend's book, dated the 18th of June 1845, in these words:—"Summons to settle draft deed—receiver—no objection by either party to the deed.—Approved." Master Brooke, I believe, rejected this entry; but even if it be evidence that some draft was approved of, it is doubtful whether the deed, which was not found in the Master's office, and no draft of it produced, could be used even against a party in the cause; but it is clear, in my opinion, that it is no evidence against Miss Katherine Blackwood, she being no party to the suit, unless she is in some way identified with the deed.

It appears, on reference to the deed, which bears date the 5th of July 1845, that it was executed by Mr. Richard Blackwood, of the first part, Mr. Brady, of the second part, and

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George Marshall Knipe, of the third part. It contains the following recital:—"And whereas, by a declaration, in writing, bearing equal date herewith, said Catherine Blackwood Brady and Katherine Blackwood declared that the said policy and bonus is vested in said Richard Blackwood, in respect of their rights, and solely to receive the sum of £3332, Irish currency, so due on foot of the bond of the said R. P. B. Brady." That recital is, of course, not evidence against Miss Katherine Blackwood; and the plaintiffs, having examined her on personal interrogatories, I understand she has entirely denied that she ever signed any such declaration. I apprehend, therefore, that the deed of the 5th of July 1845, to which she was no party—executed in a suit in which she was no party, and so far as the evidence goes, without her privity or concurrence, in no way affects her. But I shall now assume, for the sake of argument, that the recital which I have read is true, and that she did assent to the deed of 1845. The question would then arise, what is the effect of that deed?

It recites the documents I have stated, and contains the recital I have just adverted to; and the deed then proceeds thus:—"Now, these presents witness, that in pursuance and in obedience to said order (*i. e.*, the order on consent), and for the purpose of carrying the said deed of the 21st of November 1832 into effect, in respect of the sum secured by said bonus, over which said P. R. B. Brady hath control, and for and in consideration of the sum of five shillings, &c., he (the said Richard Blackwood), by and with the consent and approbation, and by the direction and appointment of the said P. R. B. Brady, testified by his being a party to and executing these presents, doth grant, bargain, sell, assign and make over unto the said George M. Knipe, his executors, administrators and assigns, all that the said hereinbefore mentioned sum of £4000, or thereabouts, to which the said P. R. B. Brady is entitled, being the difference of currency, dividends and increase on the said policy of insurance, effected by the said Charles P. Leslie and James Blackwood, as such trustees as aforesaid, and also all further and other dividends and increase which shall or may hereafter occur or become

payable, for or in respect of the same; and all the estate, right, title or interest, either at law or in equity, of him (the said Richard Blackwood), as such trustee as aforesaid (*i. e.*, as trustee in the deed of 1839, by virtue of the indorsement thereon), or of him (the said R. P. B. Brady), his executors, administrators or assigns therein, subject to the full payment and satisfaction of said sum of £3332, Irish currency, so due on foot of the said bonus of the said P. R. B. Brady as aforesaid; to have and to hold unto the said George M. Knipe, his executors, administrators or assigns, subject as aforesaid, as her and their proper money, goods and chattels, for ever, upon such trusts, nevertheless, and for such intents and purposes, and under and subject to such powers, limitations and agreements as are mentioned, expressed and declared, of and concerning the same, in and by the said indenture of the 21st day of November 1832—that is to say, that he (the said George M. Knipe), his executors, administrators and assigns, from and after the decease of the said P. R. B. Brady, shall and do call in and receive from the said Equitable Insurance Company the said sum, and all other sum and sums of money to which the said P. R. B. Brady shall be entitled to at the time of his death, on foot of said policy of insurance; and all further increase which shall or may be due or payable in respect of the same, beyond or exceeding the sum of £3332, late Irish currency, originally lent by the said trustees to the said R. P. B. Brady; and which amount on foot of said policy of insurance the said P. R. B. Brady doth hereby direct the said R. Blackwood, his executors, administrators and assigns, to pay and hand over to the said George Marshall Knipe, his executors, administrators or assigns, for the uses and purposes mentioned in said deed of the 21st of November 1832, and to and for no other purpose whatsoever.”

Now I confess I do not understand what right the plaintiffs could acquire under the deed of 1845, supposing Miss Katherine Blackwood did execute the memorandum of equal date, recited therein. It might, no doubt, as between her and her brother, if she was bound thereby, have deprived her of the right to claim the bonuses

1854.  
*Rolls.*  
O'GRADY  
v.  
BRADY.  
*Judgment.*

1854.  
*Rolls.*  
O'GRADY  
v.  
BRADY.  
*Judgment.*

which she has acquired (at all events) under the deed of 1839, the object of the deed of 1845 appearing to have been to amend the deed of 1839, and to restore, with her assent, the provisions of the deed of 1832. But if the plaintiffs, under the mortgage of 1834, had no security except on the lands mortgaged, and had no right to the benefit of the indemnity clause in the deed of 1832, they acquired no rights under the deed of 1845, the assignment under that deed, as to the bonuses, being expressly on the trusts of the deed of 1832. The plaintiffs have no claim whatever under the deed of 1845 (even assuming that Miss Katherine Blackwood was bound by its provisions), unless, under the deed of 1832 and the mortgage of 1834, they had a right to the bonuses. I cannot understand upon what ground they can claim that property not included in the mortgage assigned to them should be applied to pay off the mortgage. The plaintiffs have not made a case, nor have their Counsel argued that the bonuses formed part of the personal assets of Mr. P. R. B. Brady, and that there was a covenant by him in the mortgage. But I apprehend that the bonuses could not, under any view of the case, form part of his personal assets. This suit is not framed to administer his assets.

On the whole, I am of opinion that the plaintiffs have no claim under the mortgage to Nicholson, of which they are the assignees, to the bonuses accrued on the policy, and that the decision of the Master was right on the main question.

I shall, on the objection as to the rejection of the documents, make a special order, as the documents were perhaps evidence for the purpose of the deduction of the title of the mortgagees, although the recitals or provisions therein did not bind Miss K. Blackwood. If the question had arisen between Miss Katherine Blackwood and her brother, I should probably have directed an issue as to whether she executed the document recited in the deed of 1845. He however has taken no objection to the report, and is bound thereby.

If the plaintiffs have no title, it is not necessary that I should offer any opinion on the question argued, as to whether Miss Katherine Blackwood, as against her brother, would have been entitled to the bonuses. If the recital in the deed of 1845, as to the

declaration in writing, alleged to have been signed by her, was true, she would of course, as against her brother Richard Blackwood, have no title to the bonuses. If, on the other hand, that recital is untrue, which she swears it is, her brother (who by the deed indorsed on the deed of 1839 became the trustee in the latter deed) could not, in direct opposition to the terms of that deed, claim the bonuses.

All difficulty, however, as to Richard Blackwood, is got rid of, as he did not file objections to the report.

I shall overrule all the objections except the last, with costs, and I shall make a special order as to that which involves only a matter of form.

1854.  
*Rolls.*  
O'GRADY  
v.  
BRADY.  
*Judgment.*

EARL OF MOUNTCASHELL v. VISCOUNT O'NEILL.

May 9.

By indenture of lease, of the 2nd of March 1816, the then Earl of Mountcashell, being seised in fee of the lands of Claggan, demised them to the late Lord O'Neill for lives. Lord O'Neill shortly afterwards planted a number of trees, which were registered by him pursuant to the 23 & 24 G. 3, c. 39 (*Ir.*) It was alleged by the petitioner that the registration of the trees was informal, the requisitions of the statute not having been complied with. The lease being still subsisting, a petition was presented in the Incumbered Estates Court for the sale of Lord Mountcashell's estates, and among them, of his reversion in the lands of Claggan. The reversion and the timber growing on the lands were set up for sale by the Commissioners, and Mr. O'Hara became the purchaser of them. Lord O'Neill claimed the timber, as duly registered by him, and proceeded to sell it. The Commissioners impounded the

An injunction against felling timber having been obtained against the respondent, on a motion to dissolve it, the Court directed an action to be brought. An action having been brought, and the respondent having obtained judgment in the Exchequer Chamber, the Court dissolved the injunction, notwithstanding the pendency of a writ of error would be done

to the House of Lords; it not appearing that irreparable mischief to the petitioner by dissolving the injunction.

1854.

*Rolls.*MOUNT-  
CASHELL

v.

O'NEILL.

*Statement.*

entire of the purchase-money, and the petition was filed for an injunction to restrain the respondent, his servants, workmen and labourers from cutting down or felling, or causing to be cut down or felled, any plantation, timber, or timber trees, upon the lands of Claggan, in the county of Antrim, in the petition in this matter mentioned, or any part thereof, and from removing any timber or timber trees already cut on said lands.

On the 10th of March 1851, an order was made, granting the injunction, until the respondent should have filed his answering affidavit to the petition in this matter, and further order.

An answering affidavit having been filed, the respondent moved (May 17th, 1851), that the injunction which issued in this matter, pursuant to the order of the 10th of March 1851, should be dissolved; and an order was made that the motion should stand over, with liberty to the petitioners, or either of them, to bring such action at law as they or he might be advised, and that either party should be at liberty to apply.

The action was brought in pursuance of the liberty given by the order of the 17th of May 1851; and judgment having been obtained in the Court of Queen's Bench by the said respondent Lord O'Neill, a writ of error was brought to the Court of Exchequer Chamber (*a*), in the name of Lord Mountcashell, and the judgment of the Court of Queen's Bench in favour of Lord O'Neill having been affirmed, a motion was now made on the part of Lord O'Neill to dissolve the injunction.

*Mr. Hughes and Mr. Joy, for the respondent.*

*Mr. Deasy and Mr. Lawson, for the petitioner.*

*Argument.*

Counsel for Mr. O'Hara contended that, as it was his intention to bring a writ of error to the House of Lords, from the decision of the Court of Exchequer Chamber, in the name of Lord Mountcashell, the injunction should be continued until the decision of the House of Lords should have been obtained. Counsel for Lord O'Neill insisted that the Court should act on the decision of the Court of

(a) 2 Ir. Com. Law Rep. 436.

Exchequer Chamber in his Lordship's favour, and dissolve the injunction: 2 *Dan. Ch. Prac.*, pp. 1337, 1340, and the cases there cited were relied on.

**The MASTER OF THE ROLLS.**

Before I proceed to consider the legal questions which arise in the case, I must observe that Lord O'Neill has, in my opinion, much reason to complain as to the course which has been adopted.

Lord O'Neill is tenant to Lord Mountcashell, of certain lands under a lease, which I believe will determine on Lord O'Neill's death. A large quantity of timber was planted on those lands by Lord O'Neill many years ago. The Commissioners for the Sale of Incumbered Estates set up for sale the estate in reversion of Lord Mountcashell, and also set up for sale the timber growing on the lands. The Commissioners either inquired into the title to the timber which they thus set up for sale, or they did not. If they did make any inquiry, they must have ascertained that Lord O'Neill had in fact registered the trees planted by him; and it can scarcely be contended that the Commissioners are to endeavour to discover objections to the registration of trees, of the technical character raised in this case, and that, if any technical objection can be discovered, they are to sell the timber. If the Commissioners made no inquiry on the subject, Lord O'Neill has equal ground to complain.

Mr. O'Hara having bid for the premises and timber, the objection is raised that there has been a non-compliance by Lord O'Neill with the provisions of the statute 23 & 24 G. 3, c. 39. I understand that the objection, applicable to the registration of the principal portion of the timber, is, that the affidavit mentioned in the 2nd section of the Act was not made by Lord O'Neill himself, but by his agent; that is, that Lord O'Neill, who probably was not acquainted with the facts, should have made the affidavit, and that his agent, who was, should not. It was open to Mr. O'Hara to have insisted on being discharged from his purchase, if the timber was ornamental, or material to the possession and enjoyment of the lands. He was not bound to take a doubtful title as to the timber, or to purchase a lawsuit.

1854.  
*Rolls.*  
 MOUNT-  
 CASHELL  
 v.  
 O'NEILL.  
*Judgment.*

When I inquired from his Counsel, why Mr. O'Hara did not apply to be discharged from his purchase, Counsel stated that he had made a good bargain, and did not wish to be discharged.

If the timber is not material to the possession and enjoyment of the lands, *e. g.*, if it be what Sir A. Hart, in *Magennis v. Fallon*, calls "ordinary timber," the not making out title to it would only be ground for compensation; and accordingly the Incumbered Estates Court has, I understand, impounded the entire purchase-money.

The law on this subject was fully considered in *Stewart v. The Marquis of Conyngham* (a); and although there was some difference of opinion between Lord Chancellor Blackburne and me as to a matter of fact (b) viz., whether the timber was, upon the affidavits, to be considered ornamental timber or ordinary timber, he entirely concurred in the view I had taken of the law, and forced the title on Lord Conyngham, giving his Lordship compensation.

However, instead of Mr. O'Hara being discharged from his purchase—which he was entitled to require if the timber was material to the possession and enjoyment of the lands—or being held to the purchase, and given compensation, if the timber was not material to such possession and enjoyment, the Incumbered Estates Court has permitted the sale to stand over, Mr. O'Hara carrying on this litigation at the expense (I presume) of the funds in the Incumbered Estates Court, and of Lord Mountcashell's creditors—on the speculation that the expenses incurred by Mr. O'Hara will be paid out of the funds in that Court.

If the Commissioners thus set up lawsuits for sale, to be carried on out of the funds lodged in that Court, and if every such case is to go to the House of Lords, and the expenses are to be paid out of such funds, the Commissioners will have a very extensive attendance of professional purchasers, and the most grievous injustice will be done to Irish tenants; and if the litigation carried on by Mr. O'Hara, including the writ of error to the House of Lords, is to be at the expense of the funds in the Incumbered

(a) 1 Ir. Ch. Rep. 572-576.

(b) See 3 Ir. Chan. Rep. 104.

Estates Court, I must take the liberty of stating that Lord O'Neill has much ground to complain. Let the Incumbered Estates Court give distinct notice to Mr. O'Hara, that the writ of error to the House of Lords is to be carried on at his own expense; and I venture to conjecture that nothing more will be heard of the writ of error.

1854.  
Rolls.  
MOUNT-  
CASHELL  
v.  
O'NEILL.  
Judgment.

Having thus adverted to the merits of this case, I have to state that the legal question is, whether the intended writ of error to the House of Lords is a ground why, on a purely legal question, I am to decline to act on the high authority of a decision of the Court of Exchequer Chamber? The class of cases relied on by Mr. O'Hara's Counsel are those referred to in Mr. *Daniel's Chancery Practice*, 2nd ed., vol. 2, pp. 1337-1340.

In the cases there referred to, the question was, whether a Court of Equity would stay its own proceedings under a decree, pending an appeal from the decree? I doubt much the application of those cases to the present, where the question is entirely different—namely, whether the Court is to decline acting on a decision of a Court of Law, because a writ of error is pending? Assuming, however, that those cases do apply, it has no doubt been laid down that, where there would be irreparable mischief, the Court will stay the proceedings.

I doubt much, under the circumstances of the present case, and having regard to the entire purchase-money being impounded in the Incumbered Estates Court, that this case would be one of irreparable mischief, even if the trees were cut down; and if not, the cases referred to do not apply.

I may add, that Mr. O'Hara being determined to adhere to what one of his Counsel calls his bargain, instead of applying to the Incumbered Estates Court to be discharged, he has scarcely a right to call on this Court to interpose.

[The MASTER OF THE ROLLS, having adverted to the case of *The King of Spain v. Machado*, referred to in 2 *Daniel's Chancery Prac.*, p. 1339, and Lord Brougham's observations, proceeded as follows:—] Courts of Equity are indisposed, in the class of cases referred to, to stay the proceedings pending an appeal, if

1854.  
*Rolls.*  
 MOUNT-  
 CASHELL  
 v.  
 O'NEILL.  
 Judgment.

the appeal cannot be disposed of in a reasonable time. In the case of *Garcias v. Ricardo* (a), it was held that the Lord Chancellor will not in general stay proceedings in a cause, pending an appeal from an interlocutory order, unless the appeal can speedily be heard; and therefore, where the appeal is to the House of Lords, an application for that purpose will not be granted, unless the House will allow the appeal to be advanced so as to be heard within a limited time.

Lord Lyndhurst, in giving judgment in that case, said:—"There is this peculiarity in this case, that the application is neither made to the Judge who pronounced the decision appealed from, nor to the Court to which the appeal is carried. Now, looking to the present state of business in the House of Lords, it is not likely the appeal will be heard, in the ordinary course, within the next three years. If the appeal had been to me, I might have stayed the proceedings, because I should have had the remedy in my own hands, by advancing the appeal; but in the House of Lords I have no such power." After observing on some of the cases, Lord Lyndhurst added:—"The defendant may apply to the House of Lords to advance the appeal. If they refuse to advance it, I shall refuse this motion."

If, therefore, the class of cases referred to do apply, the present case does not appear to be one in which the Court should stay the proceedings. It appears to me, however, that those cases have no application to the present case. Where a decree is made in a Court of Equity, upon a matter peculiarly falling within its jurisdiction, the Judge may feel desirous to stay the proceedings, in order to afford an opportunity of appealing against his own decision; but where the interference of the Court of Equity is sought in aid of an alleged legal right, no case has been referred to in which the Court of Equity has declined to act on the decision of the Court of Law, because a writ of error was pending. Suppose, in this case, that the injunction was now, for the first time, applied for, would the Court be justified in disregarding the decision of the Court of Exchequer Chamber? Was it ever heard, up to the

(a) 1 Phil. 490.

present case, that the pendency of a writ of error at law, and nothing more, was a ground for filing a bill or cause petition for an injunction to stay proceedings at law on the judgment? or has a Court of Equity ever granted an injunction to suspend the effect of a judgment at law—the question being a purely legal question? The result of such a novel decision would be productive, in my opinion, of the worst consequences.

There are some cases which were not referred to, which appear to me to bear on this question.

In the case of *Harrison v. Nettleship* (a), Sir John Leach says, “A Court of Equity has no jurisdiction to relieve a plaintiff against a judgment at law, where the case in equity proceeds upon a ground equally available at law and in equity, unless the plaintiff can establish some special equitable ground for relief.” There is no special equitable ground in this case. The only question is whether the timber has been properly registered, under the statute to which I have referred, which is a purely legal question.

In the case of *Hope v. Hope* (b), Lord Langdale said:—“I am much surprised at the argument which has been used: at the hearing of these causes, liberty was given to Alexander Hope to bring any action at law he might be advised, to try his legal right, and the Court reserved the equity of the case. An action of trover was brought by him; it has been tried, and a new trial has been refused. It would therefore appear that his legal right has been so far established. The parties have wholly misconceived the nature of the proceeding, when they think that this Court can, upon this occasion, look into the proceedings at law, further than the result of the action. Using the words of Lord Alvanley on the subject, ‘I am not at liberty to consider what passed at Nisi Prius.’ The proceeding in an action brought with leave of the Court is entirely distinct from a proceeding on an issue directed to satisfy its own conscience. In case of an action, an application for a new trial is made to the Court of Law; but where an issue is directed by this Court, the application is made here. The Court, in the latter

1854.  
Rolls.  
MOUNT-  
CASHELL  
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O'NEILL.  
Judgment.

(a) 2 M. & K. 423.

(b) 10 Beav. 584.

1854.  
*Rolls.*  
 MOUNT-  
 CASHELL  
 v.  
 O'NEILL.  
 ———  
*Judgment.*

instance, takes upon itself to examine the whole proceedings at law, and, if it finds that there has been any error or miscarriage in the proceedings, or any other sufficient foundation for such a course, directs a new trial to take place. Here Adrian Hope had every legal defence open to him on the trial, and if any error or irregularity took place, he might have tendered a bill of exceptions, or have moved for a new trial on these grounds; but if he neglected to do so, and thus lost the opportunity at law, I cannot take upon myself to consider the regularity of the legal proceedings upon the consideration of the equity reserved. Lord Eldon said, that 'If this Court thinks proper to consider the case upon the record as fit to be governed by the result of a trial, the review or propriety of which belongs to a Court of Law, the opinion of a Court of Law is sought in such form, that it is regarded as conclusive, whether the judgment is obtained upon a verdict or in any other shape; but upon an issue directed, this Court reserves to itself the review of all that passes at law.'"

If I could not, consistently with principle or authority, grant an injunction (if the cause petition had been filed after the judgment of the Court of Exchequer Chamber), on the ground that a writ of error was pending, or about to be brought to the House of Lords, against that decision, I see no reason why I should now continue the injunction.

Lord O'Neill has been prevented by the order of this Court, of the 10th of March 1851 (which I could not avoid granting), from exercising what the Court of Exchequer Chamber has decided to be his legal right.

I shall not do the injustice of continuing the injunction, until the writ of error may, some three or four years hence, be decided in the House of Lords.

I shall dissolve the injunction; but as the petitioner wishes to take the case before the Lord Chancellor, by way of appeal, I shall suspend proceedings on my own order, pending such appeal, as such appeal can be disposed of without any delay.

1854.  
*Chancery.*

RICH v. ANDERSON.

(*Chancery.*)

Jan. 21.

THIS was a motion to show cause against a conditional order for a writ of prohibition in this case. The following circumstances appeared on the affidavits: John Anderson, the person above named as defendant, was, at the Petty Sessions held at Longwood, in the county of Meath, on the 13th of July 1853, convicted, at the suit of Lady Rich, of malicious trespass, and fined nineteen shillings, besides costs. Although he made a claim of title to the land on which the alleged trespass was committed, Anderson was compelled by the process of the Sessions to pay the said penalty and costs.

The affidavits on which an application for a writ of prohibition is grounded ought to be entitled simply in the Court to which application is made.

The writ of prohibition may be issued to stay proceedings before magistrates, even after conviction. The application to the Court of Chancery for a writ of prohibition is to the Common Law side of that Court, and the conditional order, though issued from the Registrar's office, should not resemble an injunction order.

The said John Anderson was again summoned by Lady Rich to appear before the Petty Sessions to be held for the same district, upon the 30th of November 1853, for another offence of the same kind, committed in the same place, and for an assault, which would have been justified if the defendant's claim of title had been well founded. Notice was then again given to the magistrates of the said Sessions, of the intention to apply for a writ of prohibition, and of the defendant's claim of title, but neither the defendant nor his attorney was present, and the magistrates sentenced him to pay a fine of £3 for the wilful trespass, and £2 for the assault, with alternative terms of imprisonment. These fines had not yet been enforced. John Anderson and his solicitor filed affidavits in Chancery, entitled as in a cause of Lady Catherine Charlotte Rich, plaintiff, John Anderson, defendant; and on the 10th of December 1853, Counsel on behalf of John Anderson applied to the LORD CHANCELLOR for a writ of prohibition in the above cause, and obtained a conditional order for such a writ. On the service of this order, affidavits were filed on behalf of the magistrates, entitled like those before mentioned, and stating facts to show that John Anderson had no pretence of title whatever.

1854.  
*Chancery.*  
 RICH  
 v.  
 ANDERSON.  
 —  
*Statement.*

The curial part of the conditional order was in the terms following:—"His Lordship doth order that the said magistrates who adjudicated on these causes, and the complainants respectively, be respectively restrained and prohibited from enforcing the orders of the magistrates, made at the Petty Sessions of Longwood, in the county of Meath, on the 30th day of November last, or otherwise proceeding against the said John Anderson, by virtue or authority thereof, unless in ten days after service of this order on Alexander Montgomery, Esq., and Thomas Reynolds, Clerk of the Petty Sessions, Longwood, in the said county of Meath, and on the complainants, good cause should be shown to the contrary." On the motion being opened, the LORD CHANCELLOR observed, "This is the form of an injunction order: it should have been a conditional order for a prohibition. The order as pronounced by the Court was formal, but there seems to be some irregularity of practice in the office. The application is in fact made to the Common Law side of the Court, but the conditional order is issued from the Registrar's office, while the writ itself is taken out from the Hanaper. As the proceeding is not very common, some mistake has perhaps been made in the Registrar's office. If the objection be pressed, I must allow the cause shown, but unless the merits of the case be investigated, I shall not give the costs."

*Argument.*

Mr. *Whiteside* and Mr. *Hamilton Smythe*, in support of the motion, having waived this formal objection, argued that the writ ought not to be issued in such a case. That the sole example of prohibition granted against Justices of the Peace is *Pomfraye's case* (a); though there is a *dictum* in *Regina v. Burnaby* (b), which suggested that it would lie after conviction; but that in *The King v. Justices of Dorset* (c), Lord Ellenborough refused the writ.

That in *Lyons v. Lyons* (d), prohibition after sentence was refused, as it was in *Blacquiere v. Hawkins* (e), on the ground that after conviction or sentence a writ of prohibition is not issued, unless

(a) Litt. Rep. 163.

(b) 2 Ld. Raym. 900.

(c) 15 East, 594.

(d) 2 Bur. 813.

(e) 1 Doug. 378.

the defect of jurisdiction appear on the face of the proceedings, which is not so here. The same rule is laid down in *Ladbroke v. Crickett* (a), and *Karslake v. Mapledoran* (b). Counsel also referred to *Anonymous* (c); *Sparkes v. Wood* (d); *Ex parte Lynch* (e); *Iveson v. Harris* (f); *Rex v. Hare & Man* (g); 2 *Inst.* 601; *Fitz. Nat. Brev., Prohibition*; *Bac. Abr., Prohibition*; *Com. Dig., Prohibition, Ship Harmony* (h); *Croucher v. Collins* (i).

1854.  
Chancery.  
RICH  
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ANDERSON.  
Argument.

THE LORD CHANCELLOR.

In this case I have satisfied myself that the jurisdiction of the Court does exist; of that I have no doubt, but I am embarrassed by the course which has been adopted. On looking into the affidavits, I find that they are entitled in a cause having no existence, and it would only furnish a bad precedent if I were to act on them. I find that in the case of *Ex parte Evans* (k), the Court of Queen's Bench held that the affidavits in support of an application for a writ of prohibition must be entitled simply in the Court, and not in any cause; consequently I do not feel myself at liberty to grant the writ: I shall therefore discharge the order, without costs, leaving it to the parties to proceed as they may be advised. The jurisdiction of the Court is fully established by the case in *Lord Raymond*. The only question that can arise is whether there was that species of assertion of a *bona fide* claim which is spoken of in the cases. On that there may arise a very serious question, but I cannot now interfere. I see nothing, however, to prevent the parties proceeding on fresh affidavits properly entitled. I must therefore discharge the order, without costs.

Feb. 11.  
Judgment.

*Hearing Book*, 11, f. 83.

- (a) 2 T. R. 649.
- (c) 1 P. Wms. 477.
- (e) 1 Madd. 15.
- (g) 1 Stra. 145.
- (i) 1 Saund. 136.

- (b) 2 T. R. 473.
- (d) 6 Mod. 146.
- (f) 7 Ves. 251.
- (h) Coop. 325.
- (k) 2 Dowl. N.S. 410.

1854.  
*Chancery.*

# KELLY v. BIRCH.

Feb. 9, 10.

A respondent is not entitled to his discharge from custody under a *ne exeat regno*, upon the ground that he was made amenable to that writ by means of an arrest under a warrant issued on informations sworn by the petitioner, in respect of the same matters which were in question in the suit; even though the prosecution instituted in pursuance of those informations be eventually abandoned, if the petitioner appear to have had a *bona fide* intention of prosecuting the criminal proceedings at the time of procuring the arrest on the warrant.

THIS was a motion that the respondent might be discharged from custody under a writ of *ne exeat regno*, obtained on the 4th of May 1853.

The petition in this cause alleged that the respondent, having been entrusted with money and securities for money belonging to the petitioner, had fraudulently misapplied them. The respondent had absconded from Ireland before the writ of *ne exeat regno* was obtained. The petitioner obtained a warrant for the arrest of the respondent, on a charge of feloniously stealing the securities. On this warrant the respondent was arrested at Southampton, and brought over to Dublin; and the writ of *ne exeat regno* was lodged with the officer in whose custody the respondent then was. Upon investigation of the charge before a magistrate, the respondent was committed for trial, on a charge of embezzlement. A true bill was found on an indictment for that offence, preferred before the grand jury of the city of Dublin, in the month of August. The respondent procured the removal of the indictment to the Court of Queen's Bench.

On the 2nd of December, the trial was called on in the Court of Queen's Bench, when the case was incomplete, in consequence of the absence of witnesses; and the Counsel for the prosecution having refused to pay the costs of the day, in the event of an adjournment to the following day being granted, the prisoner was acquitted, no evidence having been offered.

The other material facts of the case appear in the LORD CHANCELLOR's judgment.

## Argument.

Mr. Martley (with him Mr. S. Ferguson), for the respondent, referred to the law as laid down in *Wells v. Gurney (a)*; *Birch*

*v. Prodger (a); Barratt v. Price (b); Amsineh v. Barklay (c);  
Buckmaster v. Cox (d).*

1854.  
*Chancery.*

KELLY

v.

BIRCH.

*Argument.*

Mr. *Hughes*, (with him Mr. *H. Smythe*, and Mr. *Francis Brady*), for the petitioner.

Mr. *Ferguson*, in reply.

The LORD CHANCELLOR.

Feb. 10.  
*Judgment.*

In this case a very serious question arises. The present application is of a class upon which this Court always looks with favour, as all Courts do upon cases in which a party seeks to recover his liberty, by applying for his discharge from custody, upon the ground of the illegality of the process upon which he has been arrested; but in deciding it, the Court must be guided by the settled rules of law applicable to the circumstances.

The rule of law here applicable has not been controverted. It may almost be said to have been admitted by both parties, in the affidavits on one side and the other—that is to say, the facts propounded in the affidavits, on the one side, and negatived in the same way in the affidavits on the other side, would, if sustained, precisely bring the case within the known rule of law.

The respondent swears in his affidavit “that the said petitioner formed the design of instituting criminal proceedings against this deponent, not with the belief that such was a *bona fide* proceeding, or could be legally taken, or in fact sustained, or with the intention of prosecuting the same to trial, for the purposes of justice or advice,\* but as a scheme or device intended for the purpose of arresting deponent, under colour of such criminal proceedings, and of bringing deponent by means of such custody within the jurisdiction of this honourable Court, in order to have deponent detained under the writ of *ne exeat regno*.” That charge is almost in the precise language of the authorities, pointing out the circumstances under which the

(a) 1 N. R. 135.

(b) 9 Bing. 566.

(c) 8 Ves. 594.

(d) 2 Ir. Law Rep. 101.

(e) 8 B. & C. 769.

\* *Sic.*

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*Chancery.*

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*Judgment.*

party arrested is entitled to his discharge; and if the case made by the respondent in those words were sustained, the Court would be bound to act upon it, and to discharge the respondent from custody.

The law upon this subject is stated in *Wells v. Gurney* (a), the facts in which are, in a certain sense, very similar to those which the respondent alleges to exist here—because it was a case in which criminal process was used in a manner in which civil process could not have been employed, with the result that the party being placed in custody, by virtue of the criminal proceeding, was made amenable to civil process. In that case, the plaintiff had a demand recoverable by civil action—he was unable to arrest the defendant on civil process; but the defendant was upon Sunday arrested under a warrant for an assault, committed against a third person; and then, on the day following, he was taken upon the civil process. The Court of Queen's Bench, in that case, considered it plain, that there was an understanding between the parties—the plaintiff in the civil action, and the prosecutor for the assault; and it was of opinion that the mode of proceeding had been adopted merely for the purpose of giving effect to the civil process. Bayley, J., says, “It is clear that the criminal process was used on the Sunday to give the plaintiff an opportunity of making the arrest on the civil process on Monday; and by the execution of the criminal process on the Sunday, the defendant was taken into custody, and detained until Monday, and the plaintiff was thereby enabled to arrest him on the civil process on that day.” Now, the criminal process might have been executed on one day as well as the other; there was no necessity for the prosecutor to have adopted Sunday for the execution of the process; and the Court came to the conclusion that the process was executed on Sunday, merely to get the defendant into custody for the purpose of the civil process. Justice Bayley proceeds:—“I admit that contrivance must sometimes be used in order to execute the civil process of Courts of Justice; but these contrivances ought to be such as may be lawfully used in the execution of civil process; and arrest by means of criminal process is not a lawful contrivance.” That, in fact, is a summary

(a) 8 B. & C. 769.

of the law upon the subject, which is further stated in distinct terms in *Goodwin v. Lordon* (a). The judgment of the Court does not turn on this precise point; but Lord Denman, C. J., says, "Where a party is arrested on a criminal charge, in pursuance of a scheme for arresting him with more facility upon a civil charge, the Court will order him to be discharged. But the acquittal here upon two indictments preferred by the same party, at whose suit he is upon his acquittal and discharge arrested, does not of itself show that the criminal charge was a mere contrivance on the part of the plaintiff to enable him to arrest the defendant. It does not appear that it was a contrivance for that purpose."

These cases exactly show what facts the Court requires to be proved, in order to sustain an application of this kind, and that it must clearly appear that the criminal process is a mere contrivance for executing civil process, which could not otherwise be enforced.

That being established, the question arises, what was the true character of this criminal proceeding? In order to determine the answer to that question, it is better first to consider the position of the parties in May 1853. The case made by the petitioner is, that Mr. George Birch was her confidential solicitor, and that in the course of his confidential employment in that capacity, and as her agent, he received from her or from Mr. Boyle on her behalf a large sum of money, or Railway shares, for a special purpose; that in derogation of that purpose he had converted this property to his own use, and in short had been guilty of embezzlement. Now, supposing that the case so made by the petitioner is well founded in point of fact, I must consider what the position of Mrs. Kelly then was. Prior to the Act 9 G. 4, c. 55 (assuming that to have been the first statute making embezzlement a criminal offence), she would have had no power of enforcing her claims, save by a civil proceeding; but the effect of that statute was to convert such a breach of trust into a misdemeanour, and the statute expressly provides that nothing therein contained should affect any remedy which the parties otherwise had for obtaining restitution of the

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Chancery.  
KELLY  
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Judgment.

(a) 3 N. & M. 879; S. C. 1 A. & E. 378.

1854.  
*Chancery.*  
 KELLY  
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 BIRCH.  
 Judgment.

embezzled property. Mrs. Kelly consequently had two remedies, by either of which she might have sought redress—one a civil suit, either a bill in equity or an action for money had and received to her use; the other a criminal prosecution: for I may observe that this proceeding is in one sense remedial, in consequence of the provisions of the statute giving to the Court in which a conviction for embezzlement is had, the power to order restitution of the embezzled property. It is at least questionable whether a criminal Court has the machinery for making such an order effective in a case like the present, but it might certainly have ordered the restitution: and there were thus two courses simultaneously open to the petitioners, by one or other of which she might have proceeded to arrest the respondent. He might, therefore, have been arrested on the criminal process, and it is not contended that the mere fact of such an arrest would have prevented the petitioners, even for a time, from proceeding civilly against him, nor that the mere fact of the same person being the prosecutrix and the petitioner would entitle the respondent to his discharge. In the case in the *2 Irish Law Reports*, some strong expressions were thrown out by the Court, importing that if the plaintiff in the action were in any way connected with the prosecution, it would have been a ground for discharging the defendant; but these expressions must be taken with reference to the subject matter of the case, and be understood to mean improperly connected. The case in *3 Nev. & Man.* demonstrates that: for there the defendant was charged with embezzlement, and prosecuted by the same person who was plaintiff in the action: though in the report in *1 Adolphus & Ellis*, it is stated that it did not appear that the civil proceeding had any connection with the criminal charge. The Court there held that the mere fact of the existence of the prosecution did not form a ground for the discharge of the defendant:—"The acquittal here, upon two indictments preferred by the same party at whose suit he is upon his acquittal and discharge arrested, does not of itself show that the criminal charge was a mere contrivance on the part of the plaintiff." It may therefore be taken as free from doubt that it is competent for the party injured by an embezzlement which the

Act exposes to prosecution, to adopt both courses, and that he may proceed in a Criminal Court to vindicate public justice, and at the same time may proceed before a civil tribunal to recover the property of which he has been deprived, and may in both have the party detained in custody, without danger of being defeated upon that account merely. Without question, that course is open to the observation that if the criminal charge be only used for the purpose of giving effect to the civil suit, if the arrest be not *bona fide* intended to secure the person of the defaulter for the purposes of public justice, but to bring him within reach of civil process, bringing forward a merely colourable charge, the Court must then act on the authority of that case of *Wells v. Gurney*, and discharge the prisoner.

Accordingly, Mr. Birch has made in his affidavit the statement which I before read, denying the *bona fides* of the prosecution. To determine whether or not that charge is well founded, I must examine the proceedings in these cases, from their very commencement; and if that prove insufficient, I must examine the subsequent proceedings, to see whether they justify this imputation. Now, beyond all doubt, it appears that the first intention of the petitioner was to pursue her civil remedy in this Court; and for that purpose she filed her cause petition on the 4th of May 1853, and on the same day, upon the ground that the respondent was about to leave this country (an allegation which subsequent facts have proved beyond all doubt to have been well founded), she obtained a writ of *ne exeat regno*, to prevent his departure. In effect this was frustrated by the respondent leaving the jurisdiction before the writ could be executed. The civil proceeding having thus failed, the petitioner seems to have formed the intention of instituting criminal proceedings. It is now said that these were taken not *bona fide*, nor with the intention of having them prosecuted, and that in fact they were not carried out; that the prosecution was a mere contrivance; that Mr. Birch was not arrested for the purpose of convicting him upon the criminal charge, but that he was arrested by means of this warrant in a criminal case, in order to secure his person and subject it to the operation of the process of a civil Court.

1854.  
*Chancery.*  
 KELLY  
 &  
 BIRCH.  
 Judgment.

1854.  
*Chancery.*  
**KELLY**  
**v.**  
**BIRCH.**  

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*Judgment.*

Now, with respect to the inception of the proceedings, there is one statement of which, I must say, that if it were proved to be true it would be conclusive—I mean the statement which Mr. Birch in his affidavit alleges to have been made by Ryan, in an action brought by him against the petitioner. In that affidavit it is alleged that Ryan swore in presence of Mrs. Kelly, that in a conversation which she had with him, she asked the said Ryan “what course the magistrates would take with the deponent, if taken, as it was not the intention of the said Sarah Kelly to prosecute deponent, but only to have him brought by a magistrate’s warrant within reach of the writ of *ne exeat regno*, obtained from the Lord Chancellor.” If that statement be sustained in proof, there is an end of the case; it is a clear case for discharging the respondent from custody. However, Ryan has not made any affidavit in this case; it is merely asserted in the respondent’s affidavit that this statement was made in presence of the petitioner, but in the course of a public trial, and Mrs. Kelly by her affidavit expressly contradicts the allegation. Nothing can be more express than her denial; and now, in the absence of any evidence, save the statement of a statement, made under the circumstances before mentioned, and met by the most positive contradiction on the part of the petitioner, the Court will not act upon that statement against Mrs. Kelly’s affidavit. Had that allegation been sustained, if that fact had been proved, there would be no question whatever left in the case; but that conversation has not been proved here by any party to it, and I cannot act on a declaration of this kind, against the express contradiction by which it is met. The only other fact of a personal nature before the prosecution is the conversation in which the petitioner is alleged to have promised to indemnify Ryan, if he were to lose his situation in consequence of his attempting to arrest Mr. Birch on the *ne exeat*. Now, without doubt, she used every exertion to have him arrested upon that writ, and that conversation only shows that she would have had him followed with that object. I think, on the whole, that this case cannot be determined on any thing short of clear evidence of motive. It is true that the real motive can only be known to the person whom it influences. The Court must, however, form an opinion

from the surrounding circumstances, and from the facts which are known, infer the hidden springs of action.

What are the circumstances here? The petitioner had two remedies, distinct in character—she might select which she pleased, and change from one to the other—she was not bound to adopt the criminal proceeding before bringing the civil action—she was not in any way restricted: she first tried the civil remedy, which failed, and then, as the petitioner swears, she believed Birch to have been guilty of the crime of embezzlement, and instituted proceedings, as well to procure the punishment of “Birch, as with the view, by means of that prosecution, of procuring the restitution to her of the property he had so embezzled.” The case then proceeded, and Mrs. Kelly swore informations before the magistrate at the Police-office, charging Mr. Birch with an offence, in terms importing an accusation of felony, and not applicable to the real accusation. It is strange how inaccurate informations before magistrates frequently are—nothing can be more loose than the manner of swearing them; and it does seem singular that magistrates, who are responsible for the consequences, should issue warrants upon informations taken before their clerks, and possibly omitting the most important statements. But I cannot visit a party personally with a matter of this sort—it is the act of the magistrate and his clerk, and Mrs. Kelly swears she had no advice upon the subject. However, the information disclosed an offence within the statute, and was sufficient to found a claim for a warrant, which was accordingly issued and signed by a magistrate, and the respondent was thereby arrested, so far as that he was in custody under a lawful warrant, founded on information disclosing a sufficient charge. On that he was arrested at Southampton, and brought back to Ireland, on the 13th of June 1853, and on the same day the writ of *ne exeat* was lodged. Now I think the really important question is, whether this prosecution was instituted with the intention of carrying it out—whether the intention was to procure a conviction and a sentence of transportation, or other less severe punishment, and a consequent restitution—or whether I am bound to come to the conclusion that, in the words of the respondent’s affidavit, the petitioner adopted

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*Chancery.*  
KELLY  
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BIRCH.  
*Judgment.*

1854.  
*Chancery.*  
**KELLY**  
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**BIRCH.**  
*Judgment.*

this course "for the purpose of arresting him under colour of these proceedings, and so bringing him within the jurisdiction of the Court?" Now, to determine that question, I must go through the subsequent steps of the prosecution, which, without doubt, was carried on at considerable expense to the petitioner. The transactions required much research and inquiry—they required visits to different places in England and Ireland—the service of subpoenas out of the jurisdiction, and the travelling charges of witnesses—all of which were costly, and were to be added to the ordinary expenses of a prosecution—in fact, all the machinery which could have been set in motion in any case conducted with the best faith was here employed; and accordingly, at the Commission for the city of Dublin, in August 1853, an indictment was prepared and sent up to the grand jury of the city. Witnesses went before the grand jury, and on their evidence bills were found against Mr. Birch, and sent down. Now, a great deal has been said by the respondent with respect to the proceedings of the prosecutrix in the Court of Queen's Bench; and had her conduct in the month of August been like the course adopted in the late trial in that Court, I should have felt little difficulty in the matter. But it is not asserted that in August the petitioner had not the intention of proceeding upon this indictment. She swears that she was ready to proceed—that every thing was ready—that witnesses were present, brought from England, whose coming here must have been expensive—in fact, every thing was prepared for trial; and I am now struck with the rapid way in which that is passed over in Mr. Birch's affidavit, considering what did take place there; he says:—"The informations so sworn by the said Sarah Kelly, and the obtaining of the said criminal warrant thereon, were sworn and obtained for the purpose of bringing this deponent within reach of the proceedings of the said Court of Chancery, and not for the purpose of a *bona fide* prosecution; and as further proof thereof, deponent saith that the said Sarah Kelly, at the Commission for the city of Dublin, in the month of August last, sent up to the grand jury a bill of indictment against deponent for an embezzlement of the said monies and securities, being the self-same monies and securities which are the subject matter of the

said cause petition ; and the said bill of indictment was duly found, and was afterwards removed into the Court of Queen's Bench by *certiorari*."

Now, if I were asked, of what sending up the bill was evidence, I should certainly say that it tended to prove the intention of prosecuting ; and what is sworn here is, simply, that the bill was sent up, found, and removed by *certiorari*—omitting all mention of most important facts—not stating that the English witnesses were in attendance when the bill was found, nor that every thing was ready to proceed, if the prosecutrix had not been interrupted by the *certiorari*—facts from which I am compelled to conclude that she intended then to proceed to trial, and that the case would then have ended either by the conviction or acquittal of Mr. Birch. Then what does really seem to have happened ? Not that the case was removed on the application of Mrs. Kelly for the purpose of avoiding the necessity of proceeding to trial—though this affidavit might induce the belief that such was the fact—but on the application of Mr. Birch himself, founded on his affidavit, alleging that there were in the case serious questions, which might require the consideration of the full Court. In point of fact, the delay which then took place was the consequence of the respondent's own conduct, and not of any thing done by Mrs. Kelly. And when I am asked from this to conclude that the prosecution was unfounded, and find the facts to be that the prosecutrix was ready to proceed—that she resisted the application for a *certiorari*, and insisted on going to trial at once, I really cannot draw such a conclusion from such premises, or infer that she had then no *bona fide* intention of proceeding with the prosecution. On the contrary, I must say, that the facts show a full intention to carry it on.

Then, notwithstanding Mrs. Kelly's resistance, the indictment was removed to the Queen's Bench ; and there, by the statute regulating the proceedings upon a *certiorari*, it is provided that the prosecutor is not to be the moving party, and the duty of bringing the case to trial is cast upon the defendant—so that Mrs. Kelly was not responsible for the fact that the defendant's plea was not filed, and the notice of trial not served until the 18th of November, the

1854.  
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Judgment.

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*Chancery.*  
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Judgment.

last day upon which notice could have been served to obtain a trial at the Sittings after Michaelmas Term. On the 19th, Mrs. Kelly obtained an order for a special jury, and on the first day of the Nisi Prius Sittings, her Counsel applied to the Chief Justice to fix a day for the trial. On Tuesday the 29th of November, the Chief Justice fixed Friday the 2nd of December, for the trial of the cause, and Counsel for the prosecutrix requested him to fix a later day, which he refused to do. This left but two clear days to bring the witnesses over from England, and Mrs. Kelly's solicitor made an affidavit, upon which the application was renewed on Wednesday morning, but without success. A special messenger was despatched to procure the attendance of witnesses, but on Friday, when the case was called on, the English witnesses had not yet arrived, and in consequence the case for the prosecution could not be considered completely ready for trial. An application was made by Mrs. Kelly's Counsel that the case might not then be tried, in consequence of the non-attendance of jurors. I cannot say that this was an unfair advantage which the Counsel attempted to take of an accident: we all know that this course is frequently adopted. However, after a time, a sufficient number of jurors came down, and an application was then made to postpone the trial on account of the absence of the witnesses. Here arises a controversy which might have proved of some importance in one view of the case, but which I do not feel it necessary to determine, although it is admitted that the Chief Justice offered to allow the case to stand until the next day, upon payment of the costs of that day—there is some question whether he would have permitted it to be further adjourned. Be that as it may, the result was that the Counsel for the prosecution determined that, for the reasons detailed in Mr. Nesbitt's affidavit, they could not be sure of the attendance of witnesses whom they considered material; they did not accept the offer; the trial was not postponed, and the prisoner being given in charge to the jury, no evidence was offered, and a verdict of acquittal was recorded.

It is a very material fact that, according to the affidavits here, all these transactions occurred without any communication with Mrs.

Kelly—that she took no part in the consultation on the Chief Justice's offer—that she was never asked whether she would pay the costs of the day, or of several successive days—in fact that she knew nothing of what was going on in the Court. Now, it does seem to me a strong proposition that I am asked to decide; I am called upon to infer Mrs. Kelly's motives, from the actions of her Counsel, determined on without consulting her, and which, as it is sworn, disappointed and annoyed her. The real question here is as to the motives and design which influenced Mrs. Kelly in instituting this prosecution; and I think I cannot properly draw any inference as to those motives or that design, from transactions with respect to which she was never consulted.

The question then recurs, whether, considering the proceedings at the Commission, in the Queen's Bench, and in obtaining the warrant, I am bound to treat this as a merely colourable prosecution? When I am asked to weigh the force of Mrs. Kelly's affidavit, against the alleged statement of Ryan, I cannot help judging from her acts, and I find that she did prosecute—that she was prepared to go to trial at the Commission—that she was only prevented by the conduct of Mr. Birch—that the case was then postponed without her assent, and against her strenuous opposition—that the trial in the Queen's Bench was brought on—that a person was sent, at considerable expense, to procure the attendance of the English witnesses, who did not arrive until it was too late to give evidence on the trial—I think it would be a strong proposition that this was merely carrying on a contrivance. Judging from the whole case, I cannot conclude that she was carrying on a mere colourable prosecution, or that all these proceedings were taken merely for the purpose of effecting an arrest which could not be accomplished by civil process. I must, therefore, refuse this application—the costs to be costs in the cause.

*Gen. Hearing Book, 11, 72.*

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Chancery.  
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Judgment.

1854.

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21, 24.

## KELLY v. BIRCH.

S. K. obtained probate of the will of E. K. The next-of-kin of E. K. appealed from the sentence of the Prerogative Court, and the Court of Delegates reversed that sentence. In contemplation of such reversal, S. K. had transferred a considerable fund, alleged to be a portion of the assets of E. K., to B., in order to retain the dominion over it if administration were granted to her opponent. The sentence of the Delegates was ultimately reversed, under a commission of review, and S. K. called on B. to refund the property. B. not having complied, S. K. filed a cause

petition, on which an order, in the nature of a decree *pro confesso*, was made against him. B. was, by a subsequent order, permitted to file answering affidavits, upon the terms of not relying on any defence, save that the said property was a gift to him. *Held*—That if there had been any illegality in the original transaction, it could not, in that position of the cause, impede the petitioner's right to recover, even though appearing on her own case.

*Semble*—That B. being an attorney, and having suggested the arrangement, without having stated to S. K. that it would be impossible to compel him to refund, would not, under any circumstances, have been permitted to rely on the illegality of the transaction as a defence to S. K.'s suit.

Serious questions of fact cannot be satisfactorily determined by the Court in a proceeding by cause petition, without directing an issue.

THE petition in this case was filed on the 4th of May 1853. It stated that by the advice of the respondent, the petitioner, for the purpose of carrying out certain arrangements in a suit in which she was then engaged, had, in January 1851, transferred to the respondent the sum of about £12,000 Bank stock, and Railway shares to the value of £4500, which stock and shares the respondent soon afterwards sold for the sum of about £25,000, which, with two sums amounting to about £5750, were for a time, according to arrangement, permitted to remain in the Bank of Messrs. Boyle & Co., the petitioner's stock-brokers, in the name and to the credit of the respondent, and were afterwards invested in the purchase of other Railway shares, in the name of the respondent. That the arrangements intended never took effect, and that the petitioner requested the respondent to account for and transfer to her these shares, which he frequently promised to do. The petition further stated circumstances as evidence of an intention on the part of the respondent to leave this country, and defraud the petitioner of these shares; and it prayed a writ of *ne exeat regno*, and an account of the shares purchased by the respondent with the produce of the petitioner's property.

The respondent not having appeared to or answered this petition, a decretal order, in the nature of a decree *pro confesso*, was made on the petition on the 23rd of June 1853.

On the 1st of December 1853, the respondent obtained from the LORD CHANCELLOR an order permitting him to file affidavits by way of answer, and to defend the cause petition, "upon the terms of his not relying on any defence thereto, save that the several moneys and securities in the said petition mentioned were gifts to the said respondent from the petitioner," and of fully answering the personal interrogatories filed in this matter.

Affidavits were accordingly filed by the respondent, and by various persons as witnesses for him, to prove that the petitioner had given these sums as a free gift to the respondent. Those allegations were strongly combated by the petitioner; but in the affidavit filed on her behalf in reply, the following circumstances appeared :—

The petitioner had obtained, in the Prerogative Court, probate of a document purporting to be the will of Edmond Kelly, her late husband. Miss Thewles, claiming to be the next-of-kin of Edmond Kelly, disputed the validity of this document, and appealed to the Court of Delegates. The appeal seemed likely to be successful; and the petitioner was anxious to retain in her control a fund, for the purpose, as she alleged, of effecting a compromise with Miss Thewles; and fearing that the above-mentioned property might be attached by the administratrix, had transferred it to the respondent, in order to remove it from the reach of process. The Delegates decided in favour of Miss Thewles, and this decision was ultimately reversed by a commission of review.

Mr. *Hughes*, with him Mr. *Richard Armstrong*, and Mr. *Francis Brady*, for the petitioner.

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*Chancery.*  
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v.  
BIRCH.  
—  
*Statement.*

*Argument.*

Serjeant *Christian*, with him Mr. *Martley* and Mr. *S. Ferguson*, for the respondent, contended that the original transaction was against the policy of the law—that the rule applied that *in pari delicto melior est conditio possidentis*—that the Court was bound to go into the question of the original illegality of the transaction, notwithstanding the terms of the order giving the respondent liberty to defend, inasmuch as that illegality had appeared, on

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*Chancery.*  
 KELLY  
 v.  
 BIRCH.

*Argument.*

the petitioner's own showing, not in any thing advanced by the respondent: *Hamilton v. Ball* (a); *Bateman v. Ramsay* (b); *Brackenbury v. Brackenbury* (c); *Harmer v. Westmacott* (d).

Mr. *Armstrong*, for the petitioner, mentioned *Cecil v. Butcher* (e); *Butler v. Mitchell* (f), as to deciding questions of fact without an issue.

Mr. *Ferguson*, for the respondent. *Holman v. Johnson* (g); *Thompson v. Thompson* (h); *Owen v. Thomas* (i).

Mr. *F. W. Brady*, in reply. *Segrave v. Kirwan* (k).

Feb. 20.  
*Judgment.*

THE LORD CHANCELLOR.

I do not think it necessary to take further time to consider this case; it has already occupied the Court for several days, but the facts upon which I must found my decision are few. This is a case of extreme singularity, whether we consider the amount involved, the position of the parties, their relation to each other, or the circumstances under which it has arisen. It is a petition in which Mrs. Kelly alleges that she entrusted to the respondent a large amount of money or securities of which she was possessed, for the purpose of holding it to be used in the accomplishment of an arrangement with her opponent in certain litigations in the Ecclesiastical Court. I now speak merely according to the allegations in the petition. That petition was duly filed, and remained unanswered, and consequently, in the regular course of the practice of this Court she obtained a decree "*pro confesso*," affirming the propositions contained in the petition, affirming that the respondent was accountable to her for the sum he had received, and that he had promised to account with her for it. The petitioner had thus, in this position of the cause,

- (a) 2 Ir. Eq. Rep. 191.
- (c) 2 J. & W. 391.
- (e) 2 J. & W. 565.
- (g) Cowp. 343.
- (i) 3 M. & K. 353.

- (b) S. & Sc. 459.
- (d) 6 Sim. 284.
- (f) 2 Price, 466.
- (h) 7 Ves. 473.
- (k) 1 Beat. 157.

obtained a judgment, unimpeachable in point of form, unimpeachable from any thing appearing on the face of the record which could warrant the Court in saying it was erroneous. Under these circumstances, the respondent, having so allowed the time to pass at which the petitioner became entitled to a decree, having almost permitted the case to reach the stage of the proceedings when the Master might make his report, applied for liberty to make a defence, resting his claim for such permission on statements which gave him a title to ask for the assistance of the Court.

In a Court of Law a party, against whom judgment by default had been obtained, would be entitled to relief against it upon a simple affidavit, stating that he had a just defence upon the merits. Here it is necessary to go into the facts of the case, and accordingly the application must be made, founded on an affidavit of merits, setting out circumstances tending to the same point. According to my recollections of this application when it was before me, Mr. Birch stated that he had a just defence upon the merits; that his case was, that Mrs. Kelly had made over to him as a free gift the whole of this sum, at a particular time mentioned by him, the month of May 1850. Upon the occasion of hearing that application, it was suggested that there might be this weakness in the case of the petitioner—that in the original transaction there was something which ought not to be countenanced, by giving relief founded upon it; and the Court then said that the respondent stating that he had a just defence upon the merits, that his case was, that this sum had been freely given to him, and that he was able to sustain this case in evidence, was, so far as he had that just defence, entitled to the assistance of the Court, and to require that defence to be put in course of trial; that so far he had an almost absolute right: but that when it was stated that there might be a defence which did not go near the just rights of the parties, which was founded in iniquity, and based on spoliation, the Court said, “No, let him make a just defence if he can, but let him not ask the special aid of the Court in plundering his client, in acquiring money from her, to which he has no just claim. Let him not ask the Court to participate in keeping from the rightful owner this large sum, which, *ex æquo*

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*Chancery.*  
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BIRCH.  
*Judgment.*

1854.  
Chancery.  
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 BIRCH.  
 Judgment.

*et bono*, belongs to the petitioner here. If he have a regard for honour or probity, if he have a regard for his position as an attorney and an officer of this Court, let him return the property to its owner, and not venture to make such a defence. The Court cares not how the money first came into the hands of a defendant, when he comes to ask for its aid to escape a difficulty; it will not help him to make such a defence as that suggested, and will therefore limit the terms upon which he may defend, as a Court of Law does in similar cases. Let him defend the case on its rights; let him defend it, if he can, on the ground of a gift to him. If he fails in that, the Court will not assist him, by any indulgence, to deprive the lawful owner of her property." Such were the terms on which the respondent obtained leave to defend this suit. But it is now said that in the course which the case has taken, the petitioner has made statements which show that the Court ought not to entertain her petition, upon the ground of the original intention of fraud vitiating the whole transaction. Now, that principle is no novelty here; it has been acted on in Ireland as well as in England; it was acted on in the Court of Exchequer while I presided there, in the case of *M<sup>c</sup>Curdy v. Martin (a)*, in which it was decided that when a party without consideration confesses a judgment for the purpose of withdrawing his property from the demands of his creditors, he has no equity to restrain the conusee from proceeding to levy the amount of the judgment, although it never was used for the purpose for which it was confessed. That case was followed in *Taylor v. Campbell (b)*, which came before me in 1847, when the same doctrine was applied, where a judgment had been obtained by an alleged creditor of a joint-stock company against its public officer, for the purpose of coercing the non-paying shareholders; and it was held that this judgment being a contrivance to compel them, indirectly, to pay what they might have equities to resist, if sued directly, the Court would not relieve one of the parties to the contrivance against the others, though suing in breach of faith. Now, there can be no doubt that if the present case came before me with its original character, and if it appeared that this money and these securities, having belonged

(a) 5 Ir. Eq. Rep. 515.

(b) 10 Ir. Eq. Rep. 249.

to the deceased Mr. Kelly, had got into the possession of Mrs. Kelly, while they were the property of the rightful administrator, and that in anticipation of or upon the sentence of the Court of Delegates, she had endeavoured to place them out of the reach of the true owner, it would require her to make a very strong case to found a claim to recover these securities. But in every view which I can take, I do not think that I can now say that the respondent shall be permitted to defend this suit on this ground.

The form of the order, in my judgment, presents the case, exactly and only, in the form in which it would have stood if a plea had been filed, showing, in the language of the affidavit, that a gift had been made to the respondent, and that such plea was now at hearing. In fact, there is nothing now at hearing but a plea of that sort, in which it lay upon Mr. Birch to establish the affirmative of the issue, and when it would only be necessary to determine whether such plea were or not proved.

In the course of the argument, it was frequently suggested that on another ground this was not a case in which to apply the doctrine relied on by the respondent. If we are to believe Mrs. Kelly, Mr. Boyle and Mr. Campion, these facts present themselves, that the respondent was an attorney, at least occasionally, employed by Mrs. Kelly, and that he it was who had advised her to vest this property in his name, for certain reasons detailed in the affidavits. Now, no case on this precise point has been cited, and I think it would require a great deal to make a Court decide that such a defence as is relied on here could be successfully maintained against his client, by an attorney having advised such a course, and not having stated that he would immediately have the power of cheating his client of the money, would use that power, and insist that the law gave him the right to hold the fund so acquired. Upon such a defence, I do hope that a doctrine so dangerous never will be held; at all events, no similar decision has been hitherto made. It has been decided, that an attorney or Counsel cannot retain any benefit from a position in which he may have been placed by any arrangement, founded on his own advice, if it appear that he has not informed his client that it was possible he might derive such

1854.  
*Chancery.*  
**KELLY**  
**v.**  
**BIRCH.**  
*Judgment.*

1854.  
*Chancery.*  
**KELLY**  
*v.*  
**BIRCH.**  
*Judgment.*

a benefit; and I do not see any danger likely to arise from holding this doctrine, that the Court would not permit an attorney who had suggested such an investment to set up this defence of illegality, unless he had plainly told the client that he never could be compelled to refund it. It may ultimately be determined that an attorney may, in a like case, set up such a defence; but I will not be the first to decide such a proposition. If this case had come before me regularly, it might even then, in this view of it, have been difficult to adjudicate in favour of the respondent; and when, after all these transactions—after he had converted the shares into money, he acknowledges to the petitioner that he was accountable to her, the difficulty is increased. It is plain, that if he had paid over these sums to her, he never could have recovered them on this point again. If the petitioner and respondent had met at the Bank, if he had then handed over the sum to her, and she had returned it, for innocent purposes, he could not have resisted on this point; and thus, supposing even that this question were now evolved from the case—free from all doubt about the facts—free from the difficulty of the decree on default—there are two answers to this defence—one, arising out of the character and position of an attorney—the other, out of that doctrine often adopted in Courts of Law, when the suit does not rise directly out of the original illegal contract, but out of subsequent dealings; and when it is held that the original transaction is cleared away by the subsequent acknowledgment.

I come then to the true question in the case now before me. Of course, if Mr. Birch be able to prove this to have been a gift to him, there is an end of the matter; but whatever view I may have formed upon this question, I confess I do not feel this Court competent to decide upon the mass of matter which is contained in the affidavits. Very forcible observations have been made on both sides, with respect to the transactions, the parties, the witnesses and their respective characters; the case has been argued with great ability; but I am not insensible to what has been urged against the propriety of deciding such a question, upon evidence of the class now before me—taken, not upon interrogatories, but

by affidavits, which are mere voluntary statements, not giving the other party an opportunity for cross-examination; and there is therefore much infirmity attending the decision of litigated facts upon them alone.

This form of proceeding by petition was, so far as regards questions of fact, never intended to be more than an introduction to their consideration, in cases, at least, of controverted statements, depending on conflicting witnesses. In this case there is much testimony to be considered. The conduct of Mr. Birch presents, no doubt, great difficulty in the way of his sustaining in Court the case which he has made on his affidavits. However, I cannot say that the sworn statements of three or four persons are to be thrown out of consideration; but one hour's examination, in favour of a Court of Justice, will test such statements better than any investigation of the affidavits. The difficulties which the case presents impress me with the danger of doing injustice, as well to the witnesses as the parties, in finally disposing of the case. Strong observations have been made upon some of the witnesses. I do not say that I altogether dissent from them; at the same time, I cannot forget that these statements have been made upon oath; and though I think the respondent may have much difficulty in maintaining the case he has set up, from the way in which it is brought forward, and from his own conduct, I feel it to be my duty to give him the benefit of the defence, if he can sustain it. The amount involved is very large; the character of several persons is at stake upon the decree which I am called on to pronounce; and considering all these matters, I shall direct an issue to be tried between the parties, but I shall confine it to the single fact which the respondent has himself defined in his affidavit. The issue which I direct to be tried is, whether the petitioner, at any and what time, in the month of May 1851, made a gift to the respondent of the securities and moneys which, or the value whereof, are sought to be recovered by the petitioner, either absolutely, or in any and what event?

*General Hearing Book, 11, f. 140.*

1854.  
*Chancery.*  
KELLY  
v.  
BIRCH.  

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Judgment.

1854.  
*Chancery.*

## COPELAND v. CONWAY.

*Feb. 27.*

The conditional order to confirm a sale must be served on the inheritor, even if he have not appeared in the cause.

Although, as a general rule, the time for showing cause against a conditional order does not run when the Rolls Court is not sitting, the Lord Chancellor will, under particular circumstances, direct the officer to issue the side-bar rule to lodge the remaining three-fourths of purchase-money, though the conditional order to confirm the sale had not been served until after the Rolls Court had risen for the Vacation.

THIS was a general cause petition, praying a sale of certain lands. None of the respondents appeared. A decree for a sale was made, and the lands were sold. The purchaser lodged one-fourth of the purchase-money, and obtained the usual conditional order for the confirmation of the sale. This order was served upon the solicitor for the petitioner, the only solicitor in the matter. When the purchaser was about to lodge the remaining three-fourths of the purchase-money, the officer refused to issue the usual side-bar rule, as it did not appear that the conditional order had been served upon the inheritor.

Mr. *Drury*, for the purchaser, moved that the order might issue. The only party who had a solicitor in Court had been served, and great expense would be caused by serving the conditional order out of Court upon persons who were absolutely bound by the decree.

The LORD CHANCELLOR refused to make any order, saying, that the respondent inheritors ought to be served.

The conditional order was accordingly served upon the respondents out of Court, after the Master of the Rolls had risen for the Vacation, and no cause against it was shown; but the officer refused to issue the side-bar rule, alleging that the eight days, limited thereby, meant eight days during the sitting of the Rolls Court.

*Argument.*

Mr. *Drury* applied that the officer might be directed to issue the rule.

The LORD CHANCELLOR.

I think that in ordinary practice the expression, "motion day," in the 7th General Order, means motion day in the Rolls, though,

of course, if I give a conditional order, the motion day in this Court is that meant; and I often make conditional orders, directing cause to be shown, notwithstanding the 7th General Order, when there are special circumstances; but here, where it is a mere side-bar order, I do not think I should accelerate the proceedings, without some special circumstances appearing.

1854.  
*Chancery.*  
COPELAND  
v.  
CONWAY.  
*Argument.*

Mr. *Drury* relied on the delay which had already been caused, the conditional order having been obtained in November, and the only solicitor in the cause having been then served with it.

The LORD CHANCELLOR.

In your case there appear to be particular circumstances of some hardship, and there is, in fact, no danger; when such special circumstances arise, I can consider the application, and I will therefore authorise the officer to issue the order; but I will not give any general direction.

*Judgment.*

*General Hearing Book, 11, f. 155.*

GREEN v. GILES.

*March 4.*

Mr. FRANCIS FITZGERALD, for the petitioner, stated the case shortly, saying, that as it depended on the disputed construction of a will, it was necessary to have the accounts taken in the first instance.

Serjeant *Christian* submitted that the defendants had a right to the costs, beyond those which would have been incurred upon a

The Court will not decide, on the first hearing of a cause petition for an administration, that the extra costs caused by setting it down as a general cause petition, instead of for a summary reference, should be paid by the petitioner.

1854.  
*Chancery.*  
 GREEN  
*v.*  
 GILES.  
 ———  
*Argument.*

common petition, within the 15th section of the Chancery Regulation Act, as this appeared to have been a mere administration suit, clearly within that section, the questions of construction being quite open to the Master to decide on a summary reference.

The LORD CHANCELLOR.

*Judgment.*

I will not prejudice a question of costs of this sort, as I have not the entire case before me.

The usual decree for an account was taken.

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GRAHAM *v.* M'DERMOTT.

*March 4.*

The summary order on petitions, presented as within the 15th sec. of the Chancery Regulation Act, merely decides that the subject-matter of the suit is within that section.

Mr. TUDOR moved for a summary reference to the Master, under the 15th section of the Chancery Regulation Act. Notice of this motion had been served upon the respondent.

Mr. *Sherlock* opposed the reference, on the grounds that there were strong reasons to question the right of the plaintiff to maintain the suit, and that some of the Masters were of opinion that they were precluded from entertaining such a question, alleging that when the Court makes a summary order of reference, it has the same effect as a decree to account.

The LORD CHANCELLOR.

*Judgment.*

That is a mistake. All that I decide by the summary order is, that the subject-matter of the suit is within the 15th section of the Chancery Regulation Act. The Master is fully at liberty to go into any defence, and to dismiss the petition.

1854.  
*Chancery*

ROSSBOROUGH v. BOYSE.

March 14.

MR. W. P. CARR moved for leave to serve out of the jurisdiction notice of a suggestion to revive, submitting that such notice was equivalent to process; and that the Chancery Regulation Act gave a jurisdiction to make such order.

The Court has not power to order service out of the jurisdiction of the notice of a suggestion to revive a suit.

The LORD CHANCELLOR.

The 20th section of the Act, which extends to cause petitions the power of substituting service, and of service out of the jurisdiction, only applies to petitions, not to suggestions. I think you must file a short petition of revivor. It is better for you, as there might be much difficulty occasioned if the parties did not appear.

*Judgment.*

ROSSBOROUGH v. BOYSE.

1853.

Jan. 24, 25,  
26, 27, 28, 29  
31.

Feb. 1.

April 18.

THE original bill in this cause was filed in September 1849, against Thomas Boyse and Jane Stratford Boyse his wife, and it prayed that the will of Cæsar Colclough, bearing date the 6th of August

In cases relating to the devise of real estates, the Court intervenes only by

reason of the existence of some impediment to proceeding at law, in order to have the rights of the parties submitted, by means of that intervention, to a legal issue before a jury; and the Court cannot decide against the verdict of a jury otherwise than by granting a new trial.

According to the earlier authorities, the Court would not bind the inheritance by one trial, but there is now no absolute rule requiring the Court as of course to grant a second trial of an issue *devisavit vel non*, unless it is satisfied that a second trial may afford more satisfactory grounds for the final adjudication between the parties.

Although, to sustain a case of fraud, and to show that a will has been made under coercion and influence, the evidence must be pointed to the very *factum* of the will, and directly show that the instrument whose validity is disputed was executed under pressure of coercion and undue influence, the jury may, from circumstantial evidence, or from inference and presumption from such evidence, come to the conclusion that coercion and undue influence existed.

Where the Judge who tried the case expressed himself not dissatisfied with a verdict in an issue *devisavit vel non*, finding against the will, and the Court concurred in the verdict, and no new evidence had been discovered, although some existed, which the party had not availed himself of, the Court refused to grant a new trial.

1853.  
*Chancery.*  
 ROSSBOROUGH  
 v.  
 BOYSE.  
 —  
*Statement.*

1842, might be set aside and declared void, and delivered up to be cancelled; and that, if the Court should think fit, an issue might be directed to the county of Wexford, where the estates devised were situate, to try the validity of the said will; or that the plaintiffs, John Thomas Rossborough and Mary Grey Wentworth his wife, might be at liberty to proceed at law by ejectment, for the recovery of the estates devised by the said will; and for general relief.

By the will of the 2nd of August 1842, which is stated in terms in the judgment of the LORD CHANCELLOR, Cæsar Colclough devised all his real estates to his wife Jane Stratford Colclough, her heirs, executors, administrators and assigns, to and for her own absolute use and benefit. In 1846, she married the defendant Thomas Boyse. The plaintiff, Mary Grey Wentworth Rossborough, was the heiress-at-law of the testator.

The defendants answered the bill, and issue having been joined, and witnesses having been examined on both sides, the cause came on to be heard, on the 31st of January 1852, when the following decree was pronounced:—

“His Lordship doth order, that the said parties do proceed to a trial at law, and accordingly, that a writ of summons, pursuant to the provisions of the Act passed in the 8th and 9th years of the reign of her Majesty Queen Victoria, intituled ‘An Act to amend the Law concerning Gaming and Wagers,’ be sued out of one of the Courts of Law in Ireland, according to the form of the statute in such case made and provided, to which the defendants at law are forthwith to appear gratis, and admit all matters of form, so that the parties do proceed to a trial at law by a special jury of the county of Wexford, at the next Summer Assizes; to which end, the Sheriff of the said county of Wexford is forthwith to lay before Edward Litton, Esq., the Master of this Court in rotation, the grand panel of the said county, and he is thereout to name forty-eight; and thereupon, each party, plaintiffs and defendants, are to be at liberty to strike out twelve, and the remaining twenty-four are to be the jury upon the trial of the following issue, namely, whether the paper writing in the pleadings mentioned, bearing date the 6th day of August 1842, and marked with the letter B, is or

not the last will and testament of Cæsar Colclough, deceased, in the pleadings named. And it is further ordered, that the defendants in this cause be plaintiffs at law, and that the plaintiffs in this cause be defendants at law; and that the depositions of any witnesses examined in this cause, who shall, on such trial, be proved to be dead, or unable to attend to be examined, be read at the trial. And it is further ordered that the Judge, before whom such trial shall be had, is to certify to this Court the verdict which shall be had upon such issue; and on the return of the Judge's certificate, such further order shall be made as shall be just."

The case was tried at the Summer Assizes for the county of Wexford, in August 1852. Baron Pennefather gave the following certificate:—

"THOMAS BOYSE, and JANE STRATFORD BOYSE his wife, Plaintiffs;  
JOHN THOMAS ROSSBOROUGH, and MARY GREY WENTWORTH ROSSBOROUGH  
his wife, Defendants."

"I certify that, pursuant to the within order, the issue thereby directed was tried before me by a special jury of the county of Wexford, at the last Summer Assizes, held in and for said county; and that said jury, having been duly called, elected, and sworn to try said issue, found that the document, bearing date the 6th day of August 1842, was not the last will and testament of Cæsar Colclough, deceased."

"Dated 13th day of October 1852.

"RICHARD PENNEFATHER."

The learned Baron also furnished a copy of his notes of the evidence, accompanied by the following observations:—

"The foregoing is a copy of my notes of the evidence in this important case. I have no note of my charge to the jury. I explained to them, as far as I could, the law of the case, and drew their attention to the facts, with such observations, as to their applicability to the law, as the case suggested, telling them, that they were to judge of the facts, and to estimate the credit of the witnesses. I do not profess to give even an outline of my charge. No objection was made at either side to any thing I said; nor any

1853.  
*Chancery.*  
ROSSBOROUGH  
v.  
BOYSE.  
*Statement.*

1853.  
*Chancery.*  
 ROSSBOROUGH  
 v.  
 BOYSE.  
 —  
*Statement.*

suggestion from either party of any thing omitted on my part. The jury, who appeared to be very intelligent, seemed very attentive to the whole progress of the case; and I do not feel myself called on to express any opinion on their verdict."

"RICHARD PENNEFATHER."

The defendants moved for a new trial, on the grounds that the verdict was against evidence, and against the weight of evidence, and also because a material witness for the defendants was absent from the said trial, and that such new trial might take place before the Lord Chief Justice of the Queen's Bench, and a special jury of the county of Dublin. The cause was also set down for further directions.

The facts which appeared in evidence are sufficiently (for the purpose of this report) stated in the LORD CHANCELLOR's judgment.\*

*Argument.* Mr. *Whiteside*, Mr. *F. Fitzgerald*, Mr. *Lynch*, Mr. *Rolleston*, Mr. *R. Armstrong* and Mr. *Lover*, for the plaintiffs.

The Attorney-General (Mr. *Brewster*), Serjeant *Christian*, Mr. *Martley*, Mr. *J. Pennefather*, Mr. *Reeves* and Mr. *Lawson*, for the defendants.

The following were the principal cases cited: *Williams v. Goude* (a); *Constable v. Tufnell* (b); *Barry v. Butlin* (c); *Lord Trimleston v. O'Shee* (d); *Browning v. Budd* (e); *Von Stentz v. Comyn* (f); *Mountain v. Burnett* (g); *Bates v. Graves* (h); *Kelly v. Thewles* (i); *Earl of Darlington v. Bowes* (k); *Pemberton v. Pemberton* (l); *Lock v. Colman* (m); *Wilson v.*

(a) 1 Hag. 581.

(c) 2 Moo., P.C.C., 480.

(e) 6 Moo., P.C.C., 430.

(g) 1 Cox, 353.

(i) 2 Ir. Ch. Rep. 510.

(l) 13 Ves. 297.

(b) 4 Hag. 465.

(d) Mil. 336.

(f) 12 Ir. Eq. Rep. 622.

(h) 2 Ves. jun. 295.

(k) 1 Eden., 270.

(m) 2 M. & Cr. 635.

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\* It would be impracticable to give even an outline of the evidence, which was very voluminous, the trial having lasted many days. The new trial motion was debated for eight successive days before the LORD CHANCELLOR.

*Beddard (a)*; *M'Gregor v. Topham (b)*; *M'Gregor v. Topham (c)*; *Doe v. Beviss (d)*; *Elmslie v. Wildman (e)*; *Dickenson v. Blake (f)*; *Wood v. Thompson (g)*; *Gibbs v. Hooper (h)*; *Comey v. Caulfield (i)*; *Savage v. Carroll (k)*; *Bootle v. Blundell (l)*; *Cook v. Berry (m)*; *Hunter v. Atkins (n)*; *Camden v. Cowley (o)*; *Baker v. Baker (p)*; *Stopford v. West (q)*; *Stultz v. Schaffle (r)*; *Curtess v. Smalridge (s)*; *Gist v. Mason (t)*; *Spong v. Hogg (u)*; *Ford v. Tilly (x)*; *Watson v. Sutton (y)*.

1853.  
Chancery.  
ROSSBOROUGH  
v.  
BOYSE.  
Argument.

The LORD CHANCELLOR.

April 18.  
Judgment.

This case has been set down to be heard for further directions, upon a verdict found for the plaintiffs at the last Summer Assizes for the county of Wexford, on an issue directed by this Court, and by which verdict it has been found that a certain paper writing, of the 6th day of August 1842, in the pleadings mentioned, is not the last will and testament of Cæsar Colclough, deceased. The female plaintiff, Mrs. Rossborough, is the heiress-at-law of Cæsar Colclough, and consequently entitled to his real estates, in the absence of any will devising them to another. The defendants on this record claim title to these estates solely through that paper writing, alleging it to have been the valid will of Cæsar Colclough; and the verdict having negatived that allegation, the final decision of the cause in favour of the plaintiffs will become a matter of course, if this verdict should remain undisturbed. On the part of the defend-

(a) 12 Sim. 28.

(b) 3 H. L. C. 132.

(c) 3 Hare, 496.

(d) 7 C. B. R. 513.

(e) 8 Taunt. 236.

(f) 7 Br. P. C. 177.

(g) 1 Car. & Mar. 177.

(h) 2 M. & K. 353.

(i) 2 Ball & Bea. 259.

(k) 2 Ball & Bea. 451.

(l) 19 Ves. 521.

(m) 1 Wil. 98.

(n) 3 M. & K. 113.

(o) 1 W. Black. 416.

(p) Wight, 397.

(q) 12 Ir. Eq. Rep. 647.

(r) 16 Jur. 909.

(s) 1 Cas. in Ch. 43; S. C., 2 Free. 178.

(t) 1 T. R. 88.

(u) 2 W. Bl. 802.

(x) 2 Salk. 653.

(y) 1 Salk. 272.

1853.

*Chancery.*

ROSSBOROUGH

v.

BOYSE.

*Judgment.*

ants, however, a motion has been made, which was debated for several days in last Term, for a new trial of the issue; and by the notice of this motion the defendants complain of the verdict, as being against evidence, and against the weight of evidence; they further desire that a new trial should be had, because of the absence of a material witness; and in the event of a new trial being granted, they seek that the venue should be changed from the county of Wexford to the county of Dublin. The notes of the learned Judge, before whom the trial was had, have been obtained, and referred to in the discussion of the motion, and affidavits have been made in support of, and against, the application.

The first and principal question raised by this motion, and to which the Counsel on both sides chiefly addressed themselves, is, whether this issue should be submitted to a new trial, on the ground stated in the motion—namely, that the verdict already had is against evidence, or against the weight of evidence? In the outset of the consideration of this question, and in order to form a right judgment of the real meaning of it, it is important to advert to the circumstances attending the trial, upon which there is no controversy or doubt.

It was had before a special jury of the county of Wexford, in which county the large estates are situated which are the subject of this suit. No charge or insinuation has been made of any, the least, misconduct on the part of the jury—their high personal respectability has been and is unquestioned, and the learned Judge in his report states that they appeared to be very intelligent, and seemed also very attentive to the whole progress of the case, and it is not asserted that their verdict was against his charge. As regards the Judge, no complaint is made that any evidence, properly admissible on the trial, was rejected, or any admitted which ought not to have been received. He was not called upon by either side to give any special direction, or submit any special question to the jury, not embodied in the general purport of his charge. To his charge, no exception or objection whatsoever was made at the trial, or has been suggested in the notice of this motion, or in the course of the

lengthened discussion it has undergone. The learned Judge states that he explained to the jury, as far as he could, the law of the case, and drew their attention to the facts, with such observations, as to their applicability to the law, as the case suggested; telling them that they were to judge of the facts, and to estimate the credit of the witnesses; that no objection was made on either side to any thing that he said, nor any suggestion from either party of any thing omitted on his part; and he has not certified that he was dissatisfied with the verdict.

Such being the admitted facts, as regards the conduct of the trial, the Court is, I think, well warranted in concluding that it was, in all respects, fair and impartial; that there was evidence given of facts proper to be submitted to the consideration of the jury, on the side of the party in whose favour the verdict was given—that this evidence, with the whole of the testimony on both sides, and the consideration of the credit of the witnesses, were properly laid before them by the Judge, and that the legal considerations bearing on the case, and their just application to the evidence, were rightly stated and explained to the jury, with all the fulness and accuracy to be expected from the great learning and intelligence and the long experience of the very eminent Judge before whom the case was tried. If, therefore, by the terms of the notice of motion for a new trial, which designates this verdict as one against evidence, it be meant that there was not any evidence to be submitted to the jury on behalf of the party who obtained this verdict, it is, I think, plain that this objection cannot be sustained, consistently with the course taken and acquiesced in by both parties at the trial; and I do not think the objection to the verdict in this form was insisted on during the argument here, while the facts of the case, when they come to be considered, plainly show, I think, that it is untenable. The substantive objection dwelt on by the Counsel in support of the motion was that mentioned in the second branch of this section of the notice, namely, that the verdict was against the weight of the evidence, and to this objection I shall now more fully advert. In the discussion of it, Counsel ranged over a wide field of inquiry, and I do not say this was unnecessary, considering the peculiar

1853.  
*Chancery.*  
 ROSSBOROUGH  
 v.  
 BOYSE.  
*Judgment.*

1853.  
*Chancery.*  
 ROSSBOROUGH  
 v.  
 BOYSE.  
 Judgment.

circumstances of the case. The matters the most important to be attended to lie however within narrower bounds; but there is much evidence applicable to them. Upon that evidence the jury have pronounced their opinion, and have found that the document in question is not the last will and testament of Cæsar Colclough, while the defendants insist that it is; and that there was no sufficient weight of evidence to justify that finding, against the evidence given on their part, and on which they rely as satisfactorily establishing the validity of the instrument.

The defendant Mrs. Boyse was the wife of Cæsar Colclough, when that writing was signed by him; she is made by it the sole devisee of all his large estates, real and personal; but the plaintiffs allege, and their allegation has been sustained by the verdict, that in truth the document was obtained from him by coercion, and undue influence exercised by her—she having acquired over him, and used, a degree of dominion and control by which he was so subdued to her purpose as to be no longer a free agent, but the mere submissive instrument of her wishes and desires. In considering the question thus presented, it is important to keep in view the position of the Judge of a Court of Equity in such cases, and the principles by which his decision is to be guided.

According to the constitution and duties of this Court, in questions relating to devises of real estates, the decision of the validity of such devises does not rest with the Judge. He is not placed in the position of the Judge of a Court of Probate, in relation to wills of personal estate, whose province it is, unfettered by any other judgment or opinion, to weigh the evidence before him as a guide to his own original adjudication, and to decide the case accordingly upon its absolute and intrinsic merits. The position of a Judge of a Court of Equity is very different. The litigant parties only appeal to his intervention, because of some impediments existing to their proceeding by the ordinary course of ejectment in the Courts of Common Law, for the purpose of having their rights submitted, by means of that intervention, to a legal issue before a jury; and when the verdict of the jury is returned to him he cannot decide against it, otherwise than by remitting the case

for a new trial to another jury. This is the limit of his power, and the foundation of the principle on which he is to act. It is plain that such power is not to be capriciously or arbitrarily exercised, and that it is not to be put in force simply at the instance of the defeated party, as a matter of course, or on mere speculation. Faith must be given to the solemn finding on oath of a fairly selected jury, acting with the assistance and under the directions of a Judge of a Court of Law; and unless that Judge be himself dissatisfied with the verdict, or there shall appear in the evidence to be matters of sufficient weight, notwithstanding such finding, to induce the Court to take upon itself the responsibility of declining to act on the first verdict, and asking the aid of a further inquiry of the same nature—in other words, unless the Court shall think it more satisfactory for its guidance to the final result, that the case should again be submitted to a trial in a Court of Law, that finding ought to remain, and must remain, undisturbed.

The doctrine of the Court on this subject may have been at times more relaxed, and in earlier cases we find it said that the Court will not bind the inheritance, as it is expressed, by one trial. To whatever extent that notion may have prevailed, I think I may say it is no longer prevalent, and the current of modern authorities tends in the contrary direction. To support these general views, I have but to refer to the judicial language used in some of the cases referred to in the debate of this motion. The case of *Jones v. Jones* (a) is a clear authority for the principle I have stated as to the jurisdiction of this Court in cases of wills, that it has no jurisdiction to determine on their validity, and that all it can do in such cases is to direct an action, or the trial of an issue. The same doctrine is distinctly enounced by Lord Eldon, in *Pemberton v. Pemberton* (b). That the notion at one time prevailed that the inheritance of land could not be bound in this Court by one trial, is plain, from the case of *Lord Darlington v. Bowes* (c), a case heard in the year 1759, when Lord Northampton acted on this view, although obviously against his own opinion that there ought

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(a) 3 Mer. 161.

(b) 13 Ves. 297.

(c) 1 Eden, 270.

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not to be any such rule; and with that opinion the modern authorities concur, and they establish that an application for a new trial of an issue is, in every case, an application to the discretion of the Court, and to be judged of by regard to all the circumstances of the case. So the rule is stated by Lord Cottenham, in the case of *Locke v. Colman* (a): "In this Court it is matter of discretion whether any second trial shall be had." He then adds, "but in exercising that discretion, this Court very properly has regard to what would have been the rights of the parties at law, and is therefore unwilling to bind the rights by a single trial." This observation was noticed in the argument of the present case, as showing that Lord Cottenham leaned to the opinion, that the circumstance that a party whose rights to real estate can be asserted at law may by successive ejectments obtain repeated opportunities of trying those rights, afforded in itself a reason for granting a new trial in a Court of Equity; but in the next page, 46, he states more fully the principles on which new trials are to be granted, and in a manner which shows that this reason alone would not be sufficient. He says, referring to a case (*Mudd v. Scudamore*) heard before himself at the Rolls, but not elsewhere reported, and comparing it with the case of *Locke v. Colman*, then at hearing—"In both cases the consideration was, whether this Court would, under the circumstances, come to the adjudication upon the result of one trial at law, it appearing to the Court that more light upon the subject was likely to be obtained by another trial"—and again, "It is, however, sufficient for the purposes of this case to say, that the Court will not bind the inheritance by the result of a single trial, if there be reason for believing that a second trial may afford more satisfactory grounds upon which a final adjudication of the rights of the parties may be founded." The marginal note of that case is erroneous in introducing the word "especially," and the mistake in this respect has already been pointed out in the judgment of Lord Brougham, in the case of *M'Gregor v. Topham* (b). That case of *M'Gregor v. Topham* in effect closes all argument now on the general principle as to granting new trials in cases such as this; and in that case the verdict

(a) 2 Myl. & Cr. 45.

(b) 3 House of Lords Cases, 154.

was against the heir-at-law, not in his favour, as here. It conclusively establishes that there is no absolute rule in a Court of Equity requiring that Court, as of course, to grant a second trial of an issue *devisavit vel non*, unless the Judge in Equity is satisfied that a second trial may afford more satisfactory grounds for the final adjudication between the parties.

I forbear, therefore, going into any further reference to the authorities which were commented on in that case, and which were among those principally adverted to in the argument on this. There is one other case, however, very deserving of notice, the case of *Waters v. Waters (a)*. It was not referred to in the case of *McGregor v. Topham*, although decided previously to it; for, perhaps, it had not been published when that appeal was before the House of Lords. It contains a full and able summary by Vice-Chancellor Knight Bruce, of all the principles upon which the Court acts in these applications, and the marginal note, which is sustained by the report, is, "The only course taken in a suit to establish a will is to direct an issue; but the object of this being to satisfy the Court directing it, a verdict, at once the result of a well-conducted and fair trial, and the affirmation of what is by that Court itself thought to be the truth, ought not to be disturbed without substantial grounds for believing that on a second trial other evidence of a weighty nature, bearing against the existing conclusion, can and will be produced; and, therefore, where no substantial ground for such belief was shown, the Court refused a second trial. When an allegation of a matter of fact has been once fairly investigated between the litigating parties, before a competent judicature, the unsuccessful party not having been taken by surprise, nor being able to allege mistake, accident, or any subsequent discovery of a material kind, the investigation should be considered sufficient, and the judgment thereon conclusive as between the parties. It is properly incident to an issue between the devisee and heir, that the trial should be conclusive between the parties, though the conduct of the unsuccessful party may have been perfectly fair, and although neither consent nor acquiescence can be alleged against him; and

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(a) 2 De Gex & Smal. 591.

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this is equally true, whether the issue relates to a will questioned by a plaintiff or a defendant in a Court of Equity."

I have but to add, on this part of the case, that I did in this case what Sir Knight Bruce did in that: I communicated with the learned Judge as to his opinion of the verdict. The inquiry in this case, as in that, was, whether he was satisfied or dissatisfied with it? and his reply accords substantially with that given to Sir Knight Bruce in *Waters v. Waters*. The learned Baron has stated to me that he was satisfied with the verdict, although he would also have been satisfied had it been in favour of the devisee. Adopting the language of Lord Lyndhurst, in the case of *Gibbs v. Hooper* (a), I might on this ground stop here, without going farther with the case. He says there, "If this application had rested solely on the ground that the verdict given by the jury was against the weight of evidence produced at the trial, as the Judge has stated that upon the whole he was not dissatisfied with that verdict, which is the usual form in which Judges intimate their opinion that a verdict ought not be disturbed, I should not direct a second trial of this issue;" and the language of Lord Loughborough, in the case of *Bates v. Graves* (b), is pointed to the same course:—"Under the circumstances in which the cause now unfortunately comes before me, it is necessary to go into a much fuller consideration of all that passed upon the former trial, than would have been necessary if this public misfortune had not prevented me from knowing judicially what opinion the Judge formed of the verdict. Therefore I have been obliged to enter into the consideration, whether the evidence is such as would have been satisfactory to me, if I had to attend the trial."

Some notice of the material and leading facts of the case seems to me, however, to be in accordance with the usual course of judicial observation in cases like the present, and due as well to the importance of the interests involved on this application, as to the arguments of the Counsel who have with so much zeal and ability endeavoured to sustain the interests of the respective parties. The simple fact left to the jury was, whether the document

(b) 2 M. & K. 355.

(b) 2 Ves. jun. 288.

executed on the 6th day of August 1842 was or was not the last will and testament of Cæsar Colclough, deceased? That document is in the following words:—

“The last will of me, Cæsar Colclough, of Tintern Abbey, in the county of Wexford, and Boteler House, Cheltenham, Esquire. I give and devise all and singular my real and personal estate to my dear wife Jane Stratford Colclough, her heirs, executors, administrators and assigns, to and for her and their own absolute use and benefit, but as to any estate vested in me upon trust, or by way of mortgage, subject to the equities affecting the same respectively. I appoint the said Jane Stratford Colclough executor of this my will, hereby revoking any other will by me at any time heretofore made. In witness whereof I have to this my will set my hand, the 6th day of August, in the year of our Lord 1842.”

“CÆSAR COLCLOUGH.”

The evidence relating to the preparation and execution of that document is short and simple; it is the evidence of Mr. Williams, a professional gentleman in Cheltenham, who (I am at present confining myself to the day of the execution of the document) says that he saw Mr. Colclough on the morning of the 6th of August, about eleven o'clock. He was sent for, and Mr. Colclough, who walked into the room, said he had made up his mind to leave all his property to Jane, that he was sure she would do what was right. The attorney then went to his office, and prepared the draft of the will, and returned at three o'clock with the engrossment, having made an appointment with Dr. Fortnom to witness the will; that they met at Boteler House, and saw Mr. Colclough duly execute the will in their presence, and Mr. Williams swore that he was of sound and disposing mind at the time. So far the evidence is simple and direct, but this is a very small part indeed of the case, and it is necessary to advert to the antecedent circumstances, to account for the litigation which has taken place between the parties. It appears now that this document was not the only will executed at this period by Mr. Colclough, but was the conclusion of a series of three wills executed by the same gentleman, one upon the 4th of August, another upon the 5th, and the last upon the 6th

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of the same month; all of them prepared by the same gentleman, Mr. Williams, and all of them witnessed by the same witnesses, Mr. Williams and Dr. Fortnom. The will of the 4th of August has not been proved at the trial; a copy of it, however, was in evidence, and it is necessary to advert to how that document purported to convey the estates of the testator. With regard to that document, written instructions were taken down by Williams from Mr. Colclough, chiefly to this effect: He appointed Sir Thomas Esmonde and Eusebius Stratford Kirwan his executors, and he then gave to them such a portion of his personal estate as in their opinion would be sufficient to purchase an unredeemable annuity of £4,500 for his wife, Mrs. Colclough, during her lifetime; and he then empowered the executors, in the event of his personal estate being insufficient for the purchase of the annuity (which, however, he did not anticipate), to resort to the real estate. These instructions being supplied to Mr. Williams, the document is accordingly prepared by him. It speaks, however, of no ultimate disposition of the remainder of his property, except so far as it directs the trustees, in the case of any sums of money remaining in their hands, after the purchase of the annuity, to pay the same to the person or persons entitled to the residue of his real estate, but in no other way making any disposition of that estate.

It appears that on the 5th of August another will was made, and the account given of it stands thus:—It appears, from Doctor Fortnom's evidence, that in a conversation which he had with the testator, the latter spoke of his having purchased Boteler House for Mrs. Colclough; and Doctor Fortnom thought that the object of making the will of the 4th of August was to carry out that intention. The Doctor called Mr. Colclough's attention to the circumstance, that no mention of Boteler House was contained in the instrument in question; and then the will of the 5th of August was prepared. To account for the non-production of the will of the 4th, it is represented, that upon Mr. Williams attending on the 5th, he brought the will of the 4th with him, and took instructions upon the margin. He brought home that paper; and the will of the 5th is prepared, which corresponds with the will of the 4th, except in

giving to Mrs. Colclough, and her heirs, Boteler House. The remainder of the will is pretty much in the same terms as the will of the 4th, in all other respects. So matters stood. The will of the 5th was executed in the afternoon of that day, and was left in the house of Mr. Colclough; and so matters remained until the morning of the 6th, Mr. Williams being then sent for—it does not appear by whom, nor indeed is it very material. He saw Mr. Colclough, and his account of the interview is this, which I take from the evidence:—"Witness saw Mr. Colclough on the morning of the 6th, about eleven. Witness was sent for. Mr. Colclough walked into the room, as before. He said he had made up his mind to leave all his property to Jane; that he was sure she would do what was right. Witness prepared a draft of the will, returned at three o'clock with the engrossment; had made an appointment with Doctor Fortnom to witness the will. They met together, and saw Mr. Colclough only execute the will. Witness read the will, and then Mr. Colclough read it over himself. On all occasions, Mr. Colclough was of sound mind." By that will, all the antecedent provisions of the two former wills are entirely displaced. The appointment of executors is displaced—the bequest of the annuity to Mrs. Colclough is at an end—nothing is said about Boteler House, or any particular portion of the testator's property; but the whole of the estates, real and personal, are given absolutely to Mrs. Colclough, who is made executrix of the will. There cannot be a more complete disposition in favour of another than is contained in the will of the 6th of August, and so far as it does convey the whole of the property, it is necessarily a departure from the antecedent wills of the 4th and of the 5th of August. Very little appears to have occurred upon any of those occasions, when the two witnesses saw Mr. Colclough, to throw light upon this case. They admit they would have witnessed any succession of wills from day to day, however differing from each other, if called upon by the testator. They appear not to have known any thing of the amount or of the nature of the estates of Mr. Colclough, or to have asked him any thing on the subject, with the exception of there having been a remark made to Mr. Colclough, respecting his property, on

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the 5th of August, when Mr. Williams asked him what he meant to do with the residue; and he appears to have been somewhat annoyed with that remark. I shall read the evidence of Mr. Williams, in reference to the execution of the former wills; and it is as follows:—"I saw Mr. Colclough, about his will, on the 3rd of August 1842, about seven o'clock. He was in a bed-room sitting-room. Mr. Colclough said he had sent for witness, as to his will. Witness took down instructions. When witness went to the house, he saw, he thinks, Mrs. Colclough. She did not accompany him to the room. The draft will was prepared by clerks, from witness's instructions. Took draft on following day. Mr. Colclough was in the same room. Witness read the draft. The will was then engrossed. Witness called in Doctor Fortnom, to ask him to witness the will. Witness and Doctor Fortnom met on the 4th, when the will was executed. Witness left will of the 4th with Mr. Colclough. Saw Mr. Colclough on the 5th. On that day, saw will of the 4th. Went there at eleven. On the 5th, Mr. Colclough was in the same room. Mr. Colclough said he wanted to make an alteration, by leaving Mrs. Colclough Boteler House, and that he was not sure whether, by will, four thousand five hundred pounds annually had been secured to her in addition, besides the five hundred pounds secured by settlement. Witness prepared another instrument, in accordance with what Mr. Colclough desired. Prepared that will same day. Saw Doctor Fortnom again that day. The will of the 5th was then executed. Witness did not see Mrs. Colclough at all on the 5th." The witness was cross-examined, and says:—"Witness made will of the 4th instructions for will of the 5th. Took down instructions in writing, for the will of the 4th; took will of the 4th home with him, with marginal notes in pencil. Has no draft of the will of the 5th; believes he took home will of the 4th. A clerk, named Ganten, engrossed will of the 5th, witness thinks, from will of the 4th. Witness believes that Mr. Colclough told him to put down in will of the 5th, to purchase an unredeemable annuity. Mr. Colclough said that Mrs. Colclough was to have no further claim on the estate than the annuity. Mr. Colclough was feeble. Saw him sign his name unwillingly at first; not a moment elapsed between the first

and second signatures. Swears he read over the will; read will of the 6th, and Mr. Colclough read it. Will swear, to the best of his recollection, that he did read will of the 6th; will not swear positively. Witness took no instructions in writing for will of the 6th; has no draft of that will; the will was signed in about half an hour after they came in. Mr. Colclough was sitting on the bed when he signed will of the 6th; he was not fully dressed."

Now, as I have said already, there is little that relates to the case to be found in this testimony, beyond the simple statement of the fact of the execution of the will. That the testator, at the time of the execution of the will of the 5th, had not made up his mind to dispose of the residue of his estate, is plain from Williams's evidence; and he also declared to him that in making the will of the 4th of August, his intention was that Mrs. Colclough should have no claim except as to her annuity, and that he would defer disposing of the residue until he went to London.

Under these circumstances, the case was presented to the jury, of a will made, revoking and displacing all the dispositions of the day before, and of the day previous to that, and so comprehensive as to give to Mrs. Colclough the entire of the property, about which on the 4th and the 5th Mr. Colclough was undecided, and upon the 4th he said that she had no claim upon the estate, beyond the amount of the annuity. Something was said of the state of mind of Mr. Colclough at the time, and there was a good deal of evidence, no doubt, in the case in regard to the general condition of his mind before and at the time of the execution of the will. That his memory was not very perfect, as regards very recent transactions, may be collected from Doctor Fortnom's statement as to the omission to devise Boteler House to his wife; but this does not appear very material, because Doctor Fortnom himself forgot any thing respecting Boteler House upon the day of the execution of the will of the 4th. It is evident, however, that the testator was weak and debilitated; he died in a fortnight afterwards. He was suffering under a painful and distressing disease, which must have affected the state of his mind, and which, for a part of the time required the administration of a certain amount of

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stimulants; but I am not of opinion that the proportion was such as to be considered material in the case.

If the question resolved itself into one of the general capacity of making any one of these wills, there would not be much controversy, and the jury would scarcely have come to the conclusion that the testator was not of sound mind; and I think it right to say, in regard to the general character of Doctor Fortnom and of Mr. Williams, that nothing appears to justify the slightest imputation upon them: all that is meant to be said is this, that they knew nothing of the property of Mr. Colclough—that they made no inquiry—that they were not in a position to make any suggestion, and that as between the husband and the wife they were not likely to interfere, under the circumstances of the case.

I have then to consider how far other matters appearing in the case tend to substantiate, upon one side or the other, the issue found by the jury, and a question whether there was evidence of any previous intention upon the part of Mr. Colclough with regard to the disposition of his large landed estates. He had, it appears, ample personal estate to meet the provision or large annuity to his wife, but he had besides landed estates to the amount of £7000 a-year. He was the representative of a very ancient and honourable and respectable family in the county of Wexford; and according to the ordinary dictates of human nature (as I may say), one would have expected that he should have left them to devolve on the family of which he was the head; he himself had no child to leave the property to. When he died, he was upwards of seventy-six years of age; he had been married in 1818; and in 1824, six years after his marriage, a will was duly executed by him, and deposited with either Messrs. Latouche, or Wright, the banker, in London (it is not very clear with which, nor is it of any consequence), and that will undoubtedly did show an intention that the property should remain in the family of which he was the head. Its provisions are strange, perhaps impracticable—perhaps void for uncertainty—perhaps it was out of the range of human probability that the devisees could come into *esse*; but however that might be, his intention was that the property should remain in

some branch of his family. The provision for those who were then living was small, but it showed an intention not to exclude them. He bequeaths to his cousin, the Rev. Dudley Colclough, one shilling, a bequest which does not show much affection for him; he leaves to his son only £100 a-year; to another he leaves £50 a-year; and it is apparent that he did not show much regard for any of the living members of his family; but still he directed that the residue of his large fortune should accumulate for the present, until one of the male descendants of Cæsar or of Agmond, educated in England or Scotland, from four years of age, should attain the age of twenty-one. It was not out of the range of human probability that the will should operate; but however defective, it showed what was his design, and he was then married for six years; and although it was said that his wife had estranged him from all his relatives, yet that influence had not then induced him to devise away his real estates from his family. There is some slight evidence in the testimony of Mr. Nunn, as to declarations by Mr. Colclough regarding the disposition of his property in favour of his family; I say slight evidence, and, with this trifling exception, it is difficult to find in the case much to indicate a regard for his relatives. Not very long after the period when he had attained his age, he had been dissociated from all his relations and friends, by being detained as a prisoner in France; and being thus separated from them for a long series of years, it would appear that he maintained not very intimate associations with them upon his return to this country, and to the last it did not appear that any of his family were very intimate with Mr. Colclough. He had been married in 1818, when about fifty-two years of age, and from that period to his decease, he and his wife always lived together; and in the abstract, one would not be much startled, that in the unbiassed exercise of his judgment, he should have made a will in favour of his wife; but in considering whether, upon the evidence, that was actually so or not, a great deal more has to be inquired into.

To the last, at least even after the execution of the will of the 5th of August 1842, his intention as to the disposition of his property was unsettled. He certainly had not made up his mind

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to confer his estates upon his wife; and what is there which can account for, or is applicable to, the change in the disposition of his property between the evening of the 5th and the morning of the 6th of August? No reason for the change has been given by the defendant herself; but it appears in the evidence that Mr. Colclough stated to Mr. Williams, that he had made up his mind to give all his property to his wife, because he knew she would make a right use of it—a circumstance in itself from which the jury might infer that some communication had taken place between Mr. and Mrs. Colclough between the 5th and the 6th of August; but, with that solitary exception, there is nothing in the case to account for or explain his change of intention, so far at least as any thing has been disclosed in the evidence. But upon the part of the plaintiffs, a great deal of evidence has been received, bearing upon the subject; I shall not go into a detail of that evidence, but it appears that that evidence was believed by the jury, and the manner and demeanour of those witnesses was such as to entitle them to credit at the hands of a jury; and the learned Judge who tried the issue has stated that there was not any thing which he saw in the manner, or demeanour, or mode of giving their evidence, to detract from the force of their evidence. What is the result of that evidence, in general terms? Whatever may have been at one time, down to a very recent period, the strength of mind of Mr. Colclough—and he was, in the language of Miss Kirwan, a very sensible and determined man, strong-minded and of strong passions, and capable of managing his affairs)—I must say that I never knew, in my experience, of a strong and sensible mind so subjected—so reduced—so brought down under the dominion of an imperious, strong-minded woman, such as Mrs. Colclough was. The evidence discloses that he was obliged to perform the most menial and degrading offices; his wife took possession of his letters; she took upon herself to decide what society should be admitted, excluding from the house all she pleased, and only admitting those whom she wished. With regard to particular members of his family, she principally exercised a firm and determined hostility towards them, and she induced a feeling of animosity in the mind

of her husband against Mr. Sarsfield Colclough, by statements and representations which Mr. Sarsfield Colclough swore were unfounded, and which were calculated to leave a strong impression on his relative the testator.

It further appears that Mr. Williamson having obtained admission into Boteler House, at the desire of his friend Mr. Sarsfield Colclough (and here let me observe, that although this was said to have been an improper proceeding, I do not see any cause for imputing blame to the gentleman in question), and having called for the purpose of obtaining an explanation, and removing any feelings prejudicial to Mr. Sarsfield Colclough, not only was a determined feeling of hostility manifested by Mrs. Colclough, both in her manner and demeanour, but she declared that she would take care that neither Mr. Sarsfield Colclough, nor any members of his family, should benefit by the fortune of her husband. Had she in reality acquired the power and influence which she declared she possessed over her husband, to prevent the members of his family from deriving any benefit from him? And was it not a question for the jury, under all the circumstances of the case, how and by what means was that exclusion of all his family at length accomplished? All these matters were for the consideration of the jury. I do not think it necessary to go into minute details—to travel through a long series of letters and communications—I think the case is reduced to narrow limits, and to the simple question, how the change from the will of the 5th of August to that of the 6th can be accounted for, by any thing appearing in the evidence. All the parties who had resided in the house at the important period in question have been produced by the plaintiffs, and not one by the defendant, who must have known what evidence they would give, as that evidence was the subject of investigation and inquiry in the progress of the cause, and in the proceedings in the equity suit. I must also advert to this fact, that Mrs. Colclough was herself present during the trial; and she, who was the most important party to throw light upon the whole of the transactions, has not been produced.

Much stress was laid on the degree and amount of evidence

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necessary in such cases to sustain a case of fraud, and to show that a will has been made under coercion and influence; and it was strongly argued that no such case could be established, without evidence pointed to the very *factum* of the will, and directly showing that the instrument whose validity is disputed was executed under pressure of this coercion or undue influence. On this part of the case, passages were referred to in some of the authorities, expressing in different terms the principle contended for. In the case of *Williams v. Goude* (a), the language of the judgment is, that it must be shown that there was force and coercion destroying free agency, and that the act was obtained by this coercion, by importunity that could not be resisted; and in page 596 of the same report it is also said "there must be something amounting to force and coercion in obtaining the act itself." And in *Constable v. Tufnell* (b)—"If importunity is to vitiate the instrument, importunity must be proved, and proved to be of such a nature and degree that the deceased was unable to resist it—that his free will and agency were destroyed, and that he acquiesced only for peace." A passage in the judgment in the case of *Barry v. Butlin* (c) was also quoted, where it is observed, in reference to the facts of that case—"The undue influence, and the importunity which, as they are to defeat a will, must be of the nature of fraud or duress acquired on a mind in a state of debility, are insinuated, but not proved." In the case of *Stopford v. West*, as reported in the note to *Von Stentz v. Comyn* (d), the learned Baron Lefroy, now Lord Chief Justice of the Queen's Bench, says—"When undue influence, importunity or coercion are objected, it is not enough to show their existence, it is not enough to show merely their existence, or the testator's liability to them, but the party must go on to satisfy the Court that the testamentary act was obtained by means of them." And again, he says—"But all the cases are clear on this, that it is not sufficient to show that the party is in such a state that he may be acted upon by influence, coercion, importunity or fraud. You must show it—you must show

(a) 1 Hag. 581.

(b) 4 Hag. 485.

(c) 2 Moo. P. C. C. 491.

(d) 12 Ir. Eq. Rep. 647.

them applied to the obtaining of the act, and that the act impugned was the result of that influence, coercion, importunity, or fraud, applied to the subject at that time, and being made the means of obtaining that instrument." The case of *Browning v. Budd* (a) was referred to as proceeding on the same doctrine, and affirming the language of Sir John Nichol in *Williams v. Goude*. That case presents some features in which it resembles the present case—a sudden change of disposition in the disputed will from that made by a former testamentary instrument; and the exclusion from the presence of the testatrix of her husband, the object of the former dispositions; and it was much commented on in the course of the argument. For the present, I merely refer to it as it alludes to the former case of *Williams v. Goude*. Many strong and eloquent passages to the same effect were quoted from the judgment of my predecessor in the case of *Kelly v. Thewles*, in which he decided, advising her Majesty to grant a commission of review. In the copy of the judgment with which I have been favoured, I find reference made to the passages from cases which I have alluded to, and perhaps I cannot quote any part of this most able judgment in which the principle on which it proceeded is more forcibly expressed than the following:—"The fraud to vitiate must be contemporaneous; it must be discovered in, and part of, the *res gesta*. The means and power of achieving it may have been acquired and realised before, but the Judge must be satisfied that the act impeached is affected by their present use and exercise at that time, and on that very occasion, controlling and defeating volition."

The legal principles and considerations sustained by these authorities were not controverted by the Counsel for the plaintiffs in resisting this motion. The limit of their application to the case itself was much discussed, as well in reference to the peculiar facts of the case, as to the degree of evidence which these authorities would require or admit of, in support of the allegations made against this will. The Court is, however, relieved from any very elaborate investigation of this part of the case, by the simple

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(a) 6 Moo. P. C. C. 440.

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consideration, that I must assume the principles of law thus enforced to have been duly enunciated to the jury by the learned Judge who tried the case, and that in his opinion, and without objection on the part of the Counsel for the defendants, there was evidence to be submitted to them on both sides. I must conclude, that the law was expounded, with fitting observations on its application to the facts, and that the Judge was satisfied that there were facts in the case on which the jury might well find the verdict which they have found; although this verdict may be based in part on inferences and presumptions, drawn by the jury, in the exercise of the well recognised powers legally entrusted to them. They are the competent judges of circumstantial as well as of direct evidence—they are at liberty to make inferences, and to draw presumptions from facts otherwise unexplained; and if their inferences and presumptions may legitimately be founded on the circumstances submitted to them (and in this case, I must repeat that I am to presume they were told by the Judge who tried this case, and that without objection, that it was open to them to find their verdict against this will, upon the evidence before them, and upon such inferences and presumptions of coercion and undue influence, as they could rationally deduce from this evidence), there remains little to be considered, as regards the abstract principles of law on which the arguments for the defendants were mainly fixed. But it is not contended by them that cases such as this may not depend on circumstantial evidence, or on inferences and presumptions to be drawn from such evidence. Indeed, the very principle of circumstantial evidence is, that it presents facts not necessarily proving the particular matter alleged by the party producing it, but from which the truth of such matter may be rationally inferred or presumed, unless some counter-explanation of them shall be given, or may more justly be supposed to be the truth. The most momentous issues, involving life and liberty, often depend on such evidence as this; and I am not aware of any authority, that in questions of fraud, coercion or undue influence, used in obtaining a deed or a will, any different rule is to be laid down. Such cases

would rather appear to me to be peculiarly suitable to its application. In the case of *Stopford v. West*, before referred to, the Chief Justice says, "Fraud is not to be presumed even in cases of weakened capacity; it must be proved, and, of course, it may be proved by circumstantial evidence—by circumstances, but it must be by circumstances;" and he asks, in reference to a particular part of the evidence in that case, "where is the evidence—where is the inference furnished fairly, by proving Mr. Lowry's want of memory, on the 14th of the month, that he had executed a deed on the 6th?" So in the case of *Kelly v. Thevoles*, in the second reason assigned by my learned predecessor for his judgment, he makes it part of the opinion thereby enunciated, "that there was not any evidence, nor any reasonable presumption" that the testator's act was not the act of a free capable agent. In *Baker v. Graves* (a), the Lord Chancellor dwells at great length on a variety of circumstances, independent of any direct evidence, as leading him to the conclusion that the instruments there impeached were obtained by undue influence. In the case of *Collins v. Hare* (b), which was tried before the late Chief Justice Bushe, the verdict appears to have been found on circumstantial evidence; the witnesses to the impeached assignment in that case, although produced at the trial, not having been examined, and the jury found that the assignment in question there, if made at all, was obtained by undue influence; the verdict was sustained by Lord Manners, and afterwards by the House of Lords. And in that case, one of the arguments addressed to the House by the appellants' Counsel, against the verdict, was, that where a solemn instrument is impeached, on the ground of incapacity or fraud, the fact should be proved by evidence directly relating to the transaction. In the case of *Stultz v. Schaffe*, quoted from the *Jurist*, vol. 16, p. 209, the circumstances of the case are minutely and elaborately discussed, as well those relating to the *factum* of the will, as all those which bore on the probability or improbability of its being the free will of the testator; and the Judge sets out with stating, in page 911, "whether a testator be a free agent or

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(a) 2 Ves. 289.  
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(b) 2 Bligh, 106.  
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not, as there are no possible means of penetrating into the motives by which he is actuated, must be judged by his acts, deeds, and all the surrounding circumstances." And to recur to the case of *Browning v. Budd* (a), it is obviously and expressly decided on the ground, that the Court thought sufficient reasons were shown by the evidence in the case, as to the circumstances which attended the preparation and execution of the will, to rebut the presumptions against its validity, by the aid of contrary presumptions.

It is, indeed, difficult to say that any rigorous rule of evidence can be laid down in such cases, when we consider the general language in which the nature of the influence which is to invalidate the instrument is expressed in some of the cases—language more or less applicable to the case before the Court. Thus in the case of *Mountain v. Bennett* (b), so often referred to, it is said by the Chief Baron—"There is another ground, which, though not so distinct as that of actual force, nor so easy to be proved, yet, if it should be made out, would certainly destroy the will; that is, if a dominion was acquired by any person over a mind of sufficient sanity for general purposes, and of sufficient soundness and discretion to regulate his affairs in general; yet, if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind; and perhaps the most probable instance of such a dominion being acquired is that of an artful woman, like the present, having taken possession of a man and subdued him to her purpose." Influence, authority, control, are rarely acquired on the instant. They most commonly are the result of conduct ranging over considerable intervals of time, and consequently the proof of them does not so much depend on any one individual act, as on a series of transactions occurring at different periods, and of more or less weight in themselves, but all tending to the same conclusion. I may close the observations on this part of the case, in the language of Chief Justice Wilmot, in the case of *Bridgeman v. Greene and others* (c)—"In cases such as these,

(a) 6 Moo. P. C. C. 440.

(b) 1 Cox, 355.

(c) Wil. Notes, 67.

the influence is exerted secretly and privately—it is almost impossible even to adduce evidence which applies directly to the act itself.”

This being the case, I revert briefly to the leading facts established on the trial, and see ample grounds for observations on those facts, proper to be laid before the jury, whose province it was to draw from them such reasonable inferences as those facts unexplained might admit of. Influence, dominion and seclusion were abundantly proved, and they were obviously directed against the members of the Colclough family. A declaration is proved by the defendant, that she would take care none of them should have any of the property. Wills are shown to have been made from day to day, and the last one, suddenly prepared, accomplishing the total exclusion, in favour of the defendant, of the whole line of the race and family of the testator. This may be accounted for, or rather might be by suppositions—but it is left unexplained by facts. In the case of *Browning v. Budd* (a), the Judge of the Court below thought, in a like case, that similar circumstances were fatal to the will propounded. The Judges in the appellate tribunal found, however, in the concurrent and contemporaneous occurrences and in declarations of the testatrix herself, satisfactory reasons why a change of intention might reasonably be presumed, and they decided accordingly. In this case there is little or nothing of that sort; and the only observation of the deceased in reference to the will, and as to his reasons for it, affords grounds for inference that it was the result of some unexplained communication with his wife.

These questions were for the jury: they have believed the evidence;—they have not been satisfied that this will was the free act of the testator, and the Judge who tried the case is satisfied with their verdict. I cannot take upon myself to say, under these circumstances, that I ought to send this case to a new trial on the same evidence, even though the witnesses should again be forthcoming, to be produced on a second investigation; which, considering their position and residences, seems extremely improbable.

(a) 6 Moo. P. C. C. 440.

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The last question is—what just expectation can I have that new light will be thrown on the case by a second trial? This involves in part the consideration of the remaining ground on which this motion has been made; namely, that a material witness, Mr. Greene, was absent from the trial; and the question, whether, under the circumstances of the case, the defendants ought not now to be permitted to have the benefit of such other additional evidence as has been suggested. It is not part of the motion that any new evidence has been discovered, nor, indeed, has there been any. The existence of another witness whose name has been introduced, Mr. Kingdom, and all the matters he could depose to, were known to the defendants from the commencement of the suit. In regard to the absence of Mr. Greene, I cannot see any ground for this motion, adverting to the ordinary course of proceedings of this nature. It appears to have arisen very much from want of due care on the part of the defendants, in not taking the proper steps to secure his attendance, and from their relying too much on mere communication by letters. A subpoena was, no doubt, sent to him to London by letter, but it is not sworn that any answer was sent by him, acknowledging its receipt or promising to attend—due caution would have at least required this. Besides, his absence was known at the commencement of the trial; no application was made for postponement or delay, or for any reservation of liberty to produce him; and the parties took their chance for his coming. For any thing that appears, the same chance might occur again; and I apprehend it would be against all precedent and authority to grant a new trial on this ground; and it is to be observed that Mr. Greene was not examined, as he might have been in the suit, so as to have his evidence available if he should not be able to attend the trial. In reference to Mr. Kingdom, the case is weaker still. No communication was had with him; no active steps taken to secure his attendance. It is sworn that the solicitor believes he could swear what has been stated in reference to his evidence. He has not himself made any affidavit, and it does not even appear to be sworn that the parties hope to be able to secure his attendance at a further trial. But assuming the evidence in the case to turn on considerations as to the

dominion, authority and control of Mrs Colclough over her husband, it may well be doubted whether Mr. Greene's evidence or Mr. Kingdom's (neither of whom, it would appear, knew any thing about the wills, or can speak to a syllable respecting them) would have any influence upon the jury; and Mr. Greene's evidence goes no further, in truth, than that of Sir Thomas Esmonde and other witnesses. I could not collect from the observations of the Counsel for the defendants, to what extent they sought on this motion to call in aid the power of examining Mrs. Colclough herself on a future trial. This is not alluded to in the notice; and although strenuously commented on by Counsel for the plaintiffs, as being the real motive for this application, it was certainly not distinctly so avowed on the part of the defendants.

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There can be no doubt that, of all persons in the world, she is the witness who can throw light on the important facts of this case, if they are capable of being cleared up. It seems, that as the estates are now settled, they are absolutely vested in her, to her separate use. As I collected on the argument, and it was admitted, or rather I should say, it was insisted on the part of the plaintiffs, and not disputed by the Counsel for the defendants, that she was a competent witness on the trial; if she was not, and could not be so on a further trial, the suggestion as to her evidence falls to the ground. But the answer to any suggestion of a new trial being granted for the purpose of letting in her evidence (even if competent), if it was made a ground for this motion, of which even yet I have some doubt, is, that she was at the trial, in attendance during the entire of it, and was not produced or tendered as a witness. She and her Counsel were the best judges of the prudence, the propriety, and the necessity of her examination. No affidavit is made touching this matter at all by Mrs. Boyse, or any one else, and I must take it, they deliberately resolved that they would not peril the case by producing her as a witness, but would prefer taking the chance of seeing what the other witnesses could prove, and dealing with it, as they best could, in argument with the jury and the Judge. As I have said in respect to Mr. Greene, so I say in respect to Mrs. Boyse; it would be against all precedent and authority to grant a

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new trial, for the purpose of her being now examined. The case in that respect is not even so strong as that of *Boote v. Blundell* (a), where Lord Eldon refused to grant a new trial of an issue on a will; the ground of the motion being that all the attesting witnesses were not produced, the heir-at-law having declined to insist on their examination. In that case it was *prima facie* necessary for the satisfaction of the Court that the witnesses should be examined, and no verdict without their examination could be deemed satisfactory; yet the Court held, that the conduct of the parties at the trial disentitled them to a second trial on that ground.

I have now to advert to one other circumstance in the case, bearing on the question of a new trial—the allegation founded on some affidavits by witnesses examined on the former trial, that attempts have been made, and may be apprehended, to tamper with the witnesses for the plaintiffs, either in order to prevent their attending a second trial, or to induce them to vary in their testimony. This part of the case has not been fully brought before me; but as far as the affidavits have gone (and whether Mrs. Boyse has been a party to the proceedings or not), it is plain that some indiscreet partizans of her interests have been holding communications with some of the witnesses; and without minutely criticising the affidavits, it is equally plain that said communications can only have been had with a view to serve her interests in this indirect manner. The parties have acted most incorrectly. Whether on any application made to the Court, of a criminal nature, to attach them for a contempt of Court, their account of the matter might not be deemed sufficient to meet such an application, I am not now to consider; but I confess it is an alarming thing to hear of such proceedings, pending an application for a new trial, involving, of course, the reproduction of the witnesses to whom those communications have been made. I must tell the persons who have been named as connected with this part of the case, that such practices are highly criminal, and a gross contempt of the Court. The stage of the case at which this charge was made has possibly prevented further explanations being given than I have yet heard. I felt

(a) 3 Mer. 509.

bound to exclude Mrs. Boyse's affidavit, from the lateness of the period at which it was offered. Her Counsel, no doubt, acted prudently in not asking for a postponement of the motion, in order to her meeting the charge by an affidavit, fearing that she might not be able to answer the charge satisfactorily; but having taken that course, and allowed the discussion to proceed almost to the close of the argument of the second Counsel for the plaintiffs, it was then too late to present her affidavit to be brought forward. I will not, under these circumstances, prejudge the conduct of those parties who, besides Mr. Houghton, have engaged in these proceedings, or to whom they may be imputed; and from the views I have announced on the general question in the case, this part of it has been of less importance than it otherwise would be; but it has some weight with the Court, and I am bound to say that it would, even as it now appears on the affidavits before me (if my mind were at all uncertain in respect to the general merits of the case), have gone far to decide me not to expose parties to the chances of a new trial, when there was reason to suspect that their interests might be endangered by practices tending most vitally to affect the pure administration of justice.

The LORD CHANCELLOR then pronounced his order, refusing the application for a new trial, and with costs.

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WILLIAM MALLEY . . . . . *Petitioner ;*  
 EDWARD HORNSBY, Secretary to the .  
 Commissioners of Public Works in Ireland, *Respondent.*

Jan. 14.

The 52nd section of the 8 & 9 Vic., c. 69 (the Drainage Act), only applies to cases within the 29th & 30th sections of that Act; and, therefore, when the effect of the drainage operations of the district was to injure the water-power of a mill, but no dam, &c., connected with the mill, was altered, and the original water-power could not be secured without reinstating the district in the same position in which it had been before the commencement of the drainage operations: *Held*, that the owner of the mill was not entitled to maintain a petition under the 52nd section.

THIS was a petition filed under the 8 & 9 Vic., c. 69, s. 52, against the Board of Public Works. It appeared that in and previously to the year 1849, the petitioner was seised of valuable corn and bleaching mills, situate upon the Castlebar river, in the county of Mayo. The Castlebar river was fed by the surplus waters of a chain of four lakes, called Mallard, Saleen, Islandeady and Lannagh; the lowest of which, Lough Lannagh, discharged itself into the river at a distance, stated by the petitioner to be about two miles; but by the affidavit of one of the defendant's witnesses, to be about five miles by the course of the river, from the petitioner's mills. These four lakes operated as a reservoir for the supply of the river; and the waters of the first-mentioned were, to some extent, impeded in their progress—the channel between Lake Saleen and Lake Lannagh being in part subterranean. An equable and uniform supply was thus given to Lake Lannagh, and thence to the Castlebar river. In the year 1849, the Commissioners commenced drainage operations in the district, and deepened the channels between the upper lakes and Lake Lannagh, and also the channel leading from Lake Lannagh into the Castlebar river. During the progress of the works, the business of the petitioner's mills was interrupted by the drainage operations; and in November 1850, the petitioner sent a memorial to the Commissioners, claiming compensation for temporary injury. No reply was given to this notice; and in June 1851, the petitioner served notice of action, whereupon the Commissioners granted to the petitioner an inquiry, under 5 & 6 Vic., c. 89, s. 70, and awarded him the sum of £117 for compensation for the damage done in the two years preceding. He appealed to the

Quarter Sessions, and obtained an award of £650, as compensation for the damage incurred up to the month of October 1851.

The petitioner alleged that a permanent injury to his mills had been produced—this was controverted on the part of the Commissioners; but Mr. Blackiston, a civil engineer, who made an affidavit in the matter, deposed that such injury had in fact occurred, and that it could be remedied by the erection of a regulating weir at the outlet of Lake Lannagh, so as to make it conserve and gradually discharge a similar quantity to that which was conserved and discharged by said lake and its natural outlets, previous to the works of the Commissioners; that the said Saleen Lake should also be conserved by a similar regulating weir at or near its own outlet, instead of by the regulating weir connected therewith, and now erected at a considerable distance and on a much lower level, and near the shore of the said Lough Lannagh; that the said Islandeady Lake should also be conserved by a similar barrier, approaching as closely as possible to the natural barriers which had existed there; and in the event of such works being practically inconsistent with the design and intention of the arterial drainage in said district, that the said mills should be purchased, or some other compensation made, as a great proportion of the working water-power of the same had been permanently destroyed by the said works.

The amended petition in this case prayed for an issue to the next Mayo Assizes, to ascertain the amount (if any) of compensation for prior injury, to which the petitioner was entitled, and whether the works of the Commissioners, including the regulating weir, were calculated to diminish or injuriously affect the future working water-power of the petitioner's mills, and then proceeded:—"And that your Lordship may, therefore, make such further or other order, whether for payment of such or any further compensation, or to direct such works to be made by such Commissioners, in the said district, as to this Honourable Court shall seem necessary or proper, and shall issue such order for restraining the said Commissioners or other persons from doing any act or continuing such works, as to this Honourable Court shall seem just." The prayer

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then sought some formal matters, and concluded with asking for general relief.

Mr. *F. Fitzgerald*, with him Mr. *Berkeley* and Mr. *G. O. Malley*, for the petitioner.

The *Attorney-General*, with him Serjeant *Christian* and Mr. *J. Perrin*, for the respondents.

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*Judgment.*

THE LORD CHANCELLOR.

I have carefully considered the various proceedings in this case, and the affidavits which have been filed on both sides, and I have not been able to come to the conclusion that the petitioner here makes a case for the application of the jurisdiction given to this Court, by the 5 & 6 *Vic.*, c. 89, s. 52.

The evidence of Mr. Barry shows, that so far as it was necessary for conferring upon the Commissioners the peculiar powers given by the Act, every thing had been done; that the inspection, survey, and report, required by the 8th section of the same Act, had been properly made; and that the other preliminary proceedings having been duly accomplished, the district of the Castlebar river became subject to the provisions of the Drainage Act. It then becomes necessary to examine the clauses of that Act which have any bearing upon this case, and the first in order of these are, the 29th and 30th sections, which provide a peculiar mode of acting, with respect to certain peculiar classes of works. The 29th section enacts "That when, from the damming up of any river or stream by the weir, dam, or other work or obstruction of any mill or factory, occasional damage may arise by the overflowing of such river or stream, it shall be lawful for the said Commissioners to construct any reservoir, embankment, tunnel or back-drain, and to erect any floodgates, sluices, overfalls or other works, and to make any alterations in the dams, weirs, works, obstructions or water-courses, connected with such mills or factories, which shall be necessary to prevent the ill consequences of sudden or occasional floods in such river or stream, and to provide for the more safe and easy discharge of surplus water therefrom, but always so that the supply of water,

sufficient for securing the amount of working water-power, theretofore enjoyed by any such mill or factory, shall not be thereby lessened, and the level of the water at which such amount of working water-power shall be secured shall be previously inquired into, and ascertained by the said Commissioners." By this section, the Commissioners, in altering a dam or weir in connection with any mill, were expressly compelled to preserve the exact quantity of working water-power, and were not permitted to do any thing to diminish the actual power or alter the level.

Then the 30th section enacts that "If any weir, dam, or other work or obstruction, connected with any mill or factory, shall cause the flooding of lands included in any district in which this Act shall be brought into operation, situate near the stream or river flowing to or over such weir, dam, or other work or obstruction, so as thereby to injure such lands or prevent their improvement, and if such flooding cannot, in the opinion of the said Commissioners, be otherwise remedied or prevented, it shall be lawful for the said Commissioners, so far as shall be necessary for remedying or preventing such flooding and injury, or such impediment to the improvement of such lands as aforesaid, to alter any such dam, weir, work or obstruction, or the position or level thereof, and to raise or lower any water-wheel, or any machinery immediately attached thereto, and the levels of the head and fall of any water to such mill or factory; provided always that in all cases when any such raising, lowering or alterations as aforesaid, shall be effected, the amount of working water-power of such mill or factory or water-wheel shall not be in anywise lessened thereby." Now, this section also, although permitting alteration of the levels, does not contemplate the Commissioners executing any works which should have the effect of lessening the power, and then giving compensation, but it compels them to preserve the actual amount of water-power, as if in specific performance of a contract; and these sections apply to cases where the dam or weir of a mill is directly altered or injured by the operations of the Commissioners.

The 40th section is of more extensive application, and this case seems rather to come within the terms of that than of any other

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*Judgment.*

clause in the Act. By that section, power is given to the Commissioners "to alter or remove any fishing weir, erected in or upon any stream of water, or any impediments whatsoever in or on any river, stream or water-course, which now or hereafter shall be within the district within which it may be proposed that the said works shall be executed (subject, as regards weirs or dams of mills or factories, to the provisions herein contained), making such satisfaction and compensation for all damage or injury to the proprietors or other persons interested in such weirs, rivers, streams or water-courses, in the mannner therein provided."

Thus the Act contains two perfectly distinct classes of provisions; first, those of the 29th & 30th sections, which are applicable when the Commissioners act directly on the weir, dam, or other work or obstruction of any mill or factory. In such a case they are bound to preserve the actual working water-power. Secondly, those of the 46th section, which apply where there is any other impediment; there they are allowed to remove it, making compensation, and not being bound to preserve specifically the working water-power.

Now, when the 52nd section is applied to the former provisions, it is plain that it is meant to refer merely to those cases where the Commissioners are bound to preserve the actual supply of water, and in such cases the party aggrieved may apply to the Court by petition in a summary way. What then are the sections under which the Commissioners are bound to preserve the water-power? and it seems that they are only the cases within the 29th & 30th sections, while in the cases within the 40th section they are not bound to the specific preservation of any thing, but are compellable to make compensation for the injury done. By the 70th section, means of obtaining ample compensation are provided, and in the present case the petitioner has already acted under this section, —has already obtained a considerable sum for the temporary loss sustained by him; and I must think that if he had proceeded in the same way, he would have recovered substantial compensation for the more permanent injury. If the petitioner had proceeded at law, by action, mandamus or otherwise, I think it probable he would have recovered some compensation, but he is not entitled to any

thing more than compensation; to put any other construction upon the Act would completely nullify it. The affidavits bring this case fully to that extent. Mr. Blackiston proves what is necessary to be done, and his recommendations go to the root of the whole proceedings. What is it he says? that every thing done must be undone; that every thing must be put back to its former position. "That this deponent is convinced that the said injury could be in a great measure remedied by erecting the said regulating weir, or another regulating weir at the neck or outlet of the said Lough Lannagh, at the point where it united with the said Castlebar river, and constructing it so as to make it conserve, and gradually discharge a similar quantity to that which was conserved and discharged by the said lake and its natural outlets, previous to the works of the said Commissioners. That the said Saleen Lake should also be conserved by a similar regulating weir at or near its own shore or outlet, instead of by the regulating weir connected therewith, and now erected at a considerable distance, and on a much lower level, and near the shore of Lough Lannagh. That the said Islandeady Lake also should be conserved by a similar artificial barrier, approaching as closely as possible to the natural and pre-existing barrier; and in the event of such works being practically inconsistent with the design and intention of the arterial drainage, the said mills should be purchased, or some other compensation made." This affidavit of Mr. Blackiston amounts in fact to this—that to give the petitioner the relief he seeks, the whole must be replaced, that every thing done must be undone, and that the district must be restored to the state in which it formerly was.

That shows that this is not a case for relief in the nature of specific performance, but for simple compensation, and that if the Commissioners were bound to act under the provisions of the 30th section, they would be in point of fact powerless, and it therefore seems to me that whatever other remedy the petitioner may have, this is not a case for the interference of this Court in the manner sought by the petitioner. Mr. Blackiston's affidavit, as I said before, proves this, for it shows that to give the relief sought, it would be necessary to restore the district to its former condition,

1854.  
*Chancery.*  
MALLEY  
v.  
HORNSBY.  
*Judgment.*

1854.  
*Chancery.*  
**MALLEY**  
*v.*  
**HORNSEBY.**  
*Judgment.*

which, perhaps, would be physically impossible, and, at least, would throw the country into irremediable confusion. The petitioner may be able by an action or by a mandamus to compel the Commissioners to afford him redress, and I shall not deprive him of the power of seeking any remedy to which he may be entitled elsewhere, but nothing short of undoing the entire works of the district would satisfy the exigency of this petition; I shall therefore dismiss it, but without giving costs against the petitioner, for it is a case of much difficulty, and without prejudice to any other proceeding which Mr. Malley may be advised to adopt.

*Gen. Hearing Book, 10, f. 336, 342.*

TURNER and others, Assignees of JONATHAN HIGGINSON  
 a Bankrupt,  
*v.*  
 THE DUBLIN AND BELFAST JUNCTION RAILWAY  
 COMPANY.

1853.  
*Dec. 23.*

Shares in a Railway Company were standing in the name of a bankrupt at the time of his bankruptcy, on the 13th of November 1847. A large sum was then due on the shares for calls, which the Company proved for in the bankruptcy in July 1849, and received a dividend, the assignees not requiring the shares to be brought in, and the secretary of the Company expressly stating that they had no security for the calls. Subsequent calls were made, the shares still remaining in the bankrupt's name. In July 1852, the Company served a notice on the bankrupt, that the shares would be forfeited, and accordingly the shares were declared forfeited, at a meeting of the directors. In May 1853, the assignees tendered the amount of the calls which fell due after the fiat. *Held*, on a petition filed by the assignees against the Company, that the assignees might, when the Company proved for the calls, have had the transmission of the shares authenticated to them under the 8th *Vic.*, c. 16, s. 18 (Companies Clauses Consolidation Act, 1845), and have had them sold for the benefit of the bankrupt's estate.

But that the assignees not having then accepted the shares, they continued the property of the bankrupt, and had been forfeited for non-payment of the calls.

*Semble.*—The proof under the bankruptcy was not equivalent to payment of the calls, so as to satisfy the provisions of the statute, which makes the payment of the calls a condition precedent to the right to transfer the shares.

chant, against whom and his co-partner in trade, Richard Deane, a fiat of bankruptcy was awarded on the 16th of November 1847. The material statements in the petition were the following:—

At the date of the fiat, there was standing in the name of Jonathan Higginson, in the register of shareholders of the Dublin and Belfast Junction Railway Company, as the proprietor thereof, 502 shares, of £50 each, in the capital stock of the Company. The Companies Clauses Consolidation Act, 1845 (8 Vic., c. 16), was incorporated in the Act of the Dublin and Belfast Junction Railway Company. Three calls were then due on the said 502 shares, the principal whereof amounted to £6275. The last of the said calls was made on the 25th of October 1847, previously to the date of the fiat, but was not payable until the 10th of January 1848, subsequently to the date of the fiat.

On the 5th of January 1849, proof was tendered against the separate estate of Jonathan Higginson by Robert Orr, the then secretary of the Dublin and Belfast Railway Company, whereby claim was made, not only in respect of the principal sum of £6275, but also in respect of the sum of £86. 14s. 5d., interest due thereon, and proof was admitted and allowed for the aggregate of these sums, being £6361. 14s. 5d. The secretary of the Company stated that they held no security for calls, and the assignees did not claim the shares as part of the property of the bankrupt.

A dividend of 4s. 3d. in the pound was, after the admission of the proof, declared in respect of the estate of the bankrupt, and £1351. 17s. 4d. was paid on foot of the debt of £6361. 14s. 5d., by the official assignee of the bankrupt, and accepted by the Company.

In June 1852, a notice was served through the Post-office, addressed to Jonathan Higginson, stating the intention of the Company to declare the 502 shares forfeited for non-payment of calls theretofore duly made, and a notice to the same effect was inserted in the Dublin Gazette of the 25th of June 1852. At a meeting of the directors of the Company, held on the 28th of August 1852, a declaration of the forfeiture of the shares was made.

In July 1852, the solicitors of the petitioners applied to the secretary of the Company, for the account of the sum claimed to

1853.  
*Chancery.*

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1853.

*Chancery.*

TURNER

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RAILWAY  
COMPANY.*Statement.*

be due on the shares, and an account was furnished by the secretary, claiming a sum of £8697. 19s. 4d. up to the 5th of July 1852, for principal and interest on the calls on the shares, in which account was included the balance of the calls due prior to the fiat, after giving credit for the dividend received.

On the 11th of April 1853, the Railway Company, through their secretary, presented a petition to the Court of Bankruptcy in England, for the Liverpool district, praying that the proof made by the Company might be rescinded and expunged, and that the amount of the dividends might be refunded by the Company. The petition was dismissed, with costs.

On the 6th of May 1853, the solicitor for the petitioners tendered to the secretary of the Company £12,449. 6s. 10d., the amount due on the 502 shares, in respect of the calls which had been made since the date of the fiat, which the secretary refused to accept. A second tender was made on the 9th of May 1853, and an account of the sum due was at the same time furnished, in a letter requiring the secretary to place on the register of shareholders of the Company the names of the petitioners, as the holders and proprietors of the shares, which was again refused. On the 31st of May 1853, a notice was served by the secretary of the Company, to the effect that the shares having been duly declared forfeited, the Company would forthwith proceed, according to the provisions of the Companies Clauses Act, to sell the 502 shares, and claiming the sum of £19,531. 8s. as due for calls thereon. On the 4th of June, the petitioners' solicitor again tendered the sum of £12,553. 7s. 10d., and lodged with the secretary of the Company a declaration of the transmission of the shares, and an office copy of the appointment of the petitioners as assignees.

The petition prayed that the authentication of the transmission of the 502 shares might be declared to be sufficient, and an injunction to restrain the Company from taking any further step or proceeding, in order to the forfeiture or sale of the said shares, or any of them, and that the Company might be directed to have the names of the petitioners entered on the register of shareholders of the Company, as the owners of the said 502 shares, by reason

of the transmission of them to the petitioners, and that the petitioners might be declared entitled to receive all the dividends and profits which had accrued or should hereafter accrue upon the said shares, and not paid over to Jonathan Higginson or for his use; the petitioners being ready and willing to pay to the respondents the amount of all calls on the said shares, made since the date of the said fiat in bankruptcy, with interest thereon, according to the rules of the said Company, and to do all other acts, matters and things necessary and proper for having the legal estate and interest in the said shares duly vested in them as aforesaid; and that an account might be taken of what was due and owing for dividends and profits on the said shares as aforesaid, and that the respondents might be ordered to pay same to petitioners; and an injunction to restrain the respondents, their directors, secretary and other officers, from taking any proceedings to complete the forfeiture, or to sell or transfer the said shares, or any of them, save to the petitioners as such assignees.

The Company filed an affidavit in answer by their secretary, and submitted, as matter of law, whether the shares passed to the petitioners. They further submitted that the shares had been duly declared forfeited at a general meeting of the Company, on the 28th of August 1852; that the petitioners were bound to pay to the respondents all sums due for principal and interest on foot of the calls made on the 502 shares since the date of the fiat, the fees for registering the names of the petitioners as owners of the said shares, and the costs incurred by the respondents in and about the said proceedings, taken by the Company or the directors thereof, to have the shares forfeited and sold, in case the Court should declare that said petitioners were entitled to have their names entered on the register of shareholders, as the owners of the 502 shares, and to be entitled as such assignees to receive all the dividends and profits which had accrued thereon, and had not been paid over by the said Company, but which relief the affidavit submitted the petitioners were not, under the circumstances stated in the petition, entitled to obtain from the Court. That the Company was entitled to demand the balance or difference between the amount of the debt proved in the

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*Chancery.*  
TURNER  
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*Statement.*

1853.  
*Chancery.*  
 TURNER  
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 COMPANY.

*Argument.*

bankruptcy matters as aforesaid, with interest, and the amount of the dividend so received, as aforesaid, and that they were entitled to proceed with the sale of the said shares for the benefit of the said shareholders; and that the debt was not extinguished by the proof in the bankruptcy, or by the acceptance of the dividend.

The *Attorney-General*, Mr. *Martley*, Mr. *Hayes* and Mr. *Ormsby*, for the petitioners.

Serjeant *Christian*, Mr. *F. Fitzgerald* and Mr. *Norman*, for the Company.

For the petitioners it was contended, that by the bankruptcy the shares had been transmitted to the assignees; that the only things necessary to complete the title were, that the transmission should be authenticated by a declaration in writing, and that the amount due for calls subsequently to the bankruptcy should be tendered, both of which had been done: 8 *Vic.*, c. 16, s. 18. That the proof under the bankruptcy, by the secretary of the Company, who was authorised by the 140th section of the same Act to represent the Company, precluded them from claiming the balance of the calls due at the time of the fiat, and negatived their holding the shares as a security. That the subsequent declaration of the forfeiture of the shares was not valid, because there was no party then liable to the calls.

For the Company it was argued, that there could be no transmission of the shares (8 *Vic.*, c. 16, s. 16), until all calls were paid; that the assignees could have no better title than the shareholder himself, who, when a call has been made, is only entitled to the share *minus* the amount of the call. The shares had been duly declared to be forfeited by the directors under the 29th section. The proof in the bankruptcy was not equivalent to payment of the calls due at the date of the fiat: *Ex parte Moore* (a); *Binks v. Beahan* (b); *Penn v. Bennett* (c); *Newton v. Scott* (d). That the suit was in the nature of a redemption suit by a mortgagor, in which a decree

(a) 2 Gl. & J. 172.

(b) 1 Bing. 281.

(c) 4 Camp. 205.

(d) 10 M. & W. 471.

would be made on the terms only of paying all due for principal, interest and costs.

The LORD CHANCELLOR.

A question of considerable difficulty arises in this case. The petition has been filed by Charles Turner and several others, assignees of Jonathan Higginson, a bankrupt, and it prays for an order that the authentication of the transmission of 502 shares in the Belfast Junction Railway Company may be deemed and declared to be sufficient; and for an injunction against the Company, to prevent any further step or proceeding in order to the forfeiture or sale of the shares, or any of them, and that the Company may be directed to have the names of the petitioners entered on the register of shareholders, as the owners of the 502 shares, by reason of this transmission to them as assignees; and that the petitioners may be declared entitled as such assignees to receive the dividends and profits which have accrued, or shall hereafter accrue, upon the shares, and not heretofore paid over to Jonathan Higginson, or for his use, the petitioners offering to pay all calls on the shares, made since the fiat in bankruptcy, with interest, according to the rules of the Company, &c., and an account of the dividends on the shares; and that the respondents may be ordered to pay the same.

The claim on the part of the petitioners is, first, in point of form, to be declared to have acquired, under the 18th section of the Companies Clauses Consolidation Act 1845 (8 Vic., c. 16), the shares vested in the bankrupt, and to have the transmission authenticated by a declaration in writing, according to the provisions of that Act.

The remainder of the petition is of substance, and consists of two parts:—First, that the Company may be restrained from proceeding to the forfeiture or sale of the shares formerly held by the bankrupt, the petitioners offering to pay all the calls due on the shares, which may be considered to be properly payable with regard to them. The second part of the second branch of the petition is, that the petitioners may be declared entitled to the profits and dividends on the shares which have accrued since the date of the fiat of bankruptcy.

1853.  
*Chancery.*  
TURNER  
v.  
DUBLIN AND  
BELFAST  
RAILWAY  
COMPANY.  
*Judgment.*

1853.

*Chancery.*

TURNER

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RAILWAY  
COMPANY.*Judgment.*

The title of the petitioners is shortly this:—These shares were vested in Mr. Higginson at the time of his bankruptcy. At that time, certain calls were due on them, amounting to the sum of £6275, and £86. 14s. 5d. interest—the fourth, fifth and sixth calls amounting together to £6361. 14s. 5d. The Railway Company having legal rights vested in them, and having a right to demand payment of the calls, and to enforce it by action, and having a legal title to prove in the bankruptcy, tendered their proof, and in that proof, according to the ordinary form in use, the managing person for the Company expressly stated that they had no security for the demand on foot of the shares, and accordingly, in that state of facts, the Company was permitted to prove for the amount of the shares. No inquiry was made, as to the question of security; no allegation was set up on the part of the assignees, that the shares themselves were a security, and ought to be brought to the funds of the bankruptcy, according to the ordinary rule, before the proof was allowed; nor was any claim or title to the shares put forward on behalf of the assignees, either in that respect, or as electing or choosing to take them as part of the general property and effects of the bankrupt. So matters remained. The Company proved, on the estate of the bankrupt, to the amount of £6361. 14s. 5d., and a sum of £1351. 17s. 4d. was received by the Company, on this proof, on the 23rd of January 1852, leaving a balance of £5009. 17s. 2d. Matters remained so, as regards the Company and the assignees of the bankrupt's estate, for a considerable time. Further calls, to a large amount, accrued due—the seventh, eighth, ninth and tenth calls, including interest. The balance of the previous calls, and all these calls, were left unpaid, amounting altogether to the large sum of £19,501, giving credit for the sum received under the commission.

The fiat in bankruptcy issued in 1847. On the 13th of November in that year, the assignees were appointed. On the 5th of July 1849, the proof was tendered, and what I have stated took place. The next intervention of the petitioners upon the subject took place in July 1852, a period of exactly three years from the time when the proof was tendered and admitted, in the manner I have stated.

In the meantime the calls accrued due. The bankrupt was treated as still being the owner of the shares, and the notices were served on him; and he was the person entered in the books of the Company as responsible for the subsequent calls. Ultimately, the Company proceeded to a forfeiture of the shares, for non-payment of all the calls, including the balance due at the time of the bankruptcy. The shares, which had been worthless at the time of the proof—I mean worthless, if the parties were to pay up the calls—have now risen to a price which would remunerate, and amply remunerate, the assignees under the commission, if they can succeed in getting the shares for the amount of the dividend which they have paid (leaving the balance unpaid), and, of course, the subsequent calls; and they have instituted this proceeding to establish their right to do that against the Company, and to have themselves declared the owners of the shares, at the price of the dividend, instead of the price of the calls. That is the state of the record, in relation to the petitioners' claim.

It is contended, that by the operation of the Companies Clauses Consolidation Act, the shares, so long as they remain in the name of any individual, are a security to the Company for the amount of the calls—because the Company have a right to declare the shares to be forfeited, and have a right to sell them thereupon; and they are bound, after discharging the amount of the calls, to pay the difference, if any, between the price of the shares and the amount of the calls, to the holder of the shares, discharged of liability to any calls, save those accruing subsequently to the purchase; and it is said, that although these shares were not treated, as between the petitioners and the Company, at the time of the proof, as a security at all, although, in express terms, the Company negatived their having any security, and the assignees considered that the shares were not held as securities, and although the assignees never looked on the shares as part of the property of the bankrupt, they are now entitled to have the benefit of the shares in the manner sought; because a party proving a demand under a commission cannot hold any property of the bankrupt as a security, but must give it up for the benefit of the creditors at large. That seems certainly a

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*Chancery.*  
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*Chancery.*  
**TURNER**  
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**RAILWAY**  
**COMPANY.**  
*Judgment.*

strong proposition, having regard to the facts of this case, that persons, whose only claim is that of partners in a general concern, are to have the benefit and profit of that partnership, without contributing to the common fund in aid of the other shareholders, whose money and exertions have produced that benefit; and one would be startled to find any case or authority by which the Court would be compelled to do a thing so contrary to natural justice and equity, as to allow the representative of an insolvent partner to come in and ask, without adequate contribution, to share the profits which have been the fruit and result of the money of the solvent partners. It is contended, in support of the petition, that proof having unquestionably been made by the Company against the bankrupt's estate, it cannot be recalled; that having made their proof, they have made their election, and cannot retract; and so, no doubt, the general law is established by the cases, as in those of *Ex parte Joseph (a)*, and *Ex parte Solomon (b)*, where a creditor, having a lien on property of the bankrupt for his debt, was held to be concluded by proving his debt, voting in the choice of assignees and signing the certificate, and was ordered to deliver up the property on which he had a lien.

The next question is, whether that proposition is applicable to shares in such a Company as this; that is to say, whether shares held by the bankrupt are to be considered as between the Company and the assignees as securities, under the facts of this case? That question came before Mr. Commissioner Macan, in the case of *In re Jennings (c)*. An application was made in that case by the Belfast and County Down Railway Company to prove for calls due to them by the bankrupt, and the learned Commissioner held that the shares were in the nature of a lien or mortgage, and that the Company could not, under the terms of the Act of Parliament, prove for the amount, without submitting to have the shares sold for the benefit of the creditors of the bankrupt, and he ruled accordingly. That shares are to be looked on in that light appears

(a) 18 Ves. 341.

(b) 1 Gl. & J. 25.

(c) 1 Ir. Ch. Rep. 236.

from the case of *The Great Southern Railway Company v. Kennedy* (a), where Parke, B., says :—"Shares forfeited are in the nature of a lien or mortgage." Upon that general view of the case, Mr. Commissioner Macan, in a full and elaborate judgment, held that shares bore that character, and refused to allow the Railway Company, until they conformed to the ordinary rule and principle, to prove in bankruptcy.

1853.  
*Chancery.*  
TURNER  
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Judgment.

The case came before me on appeal (b). The principal ground of appeal did not controvert the principles laid down by the Court of Bankruptcy; and, in my judgment, I expressed my concurrence with those principles, and determined accordingly. But the chief question on the appeal was not exactly that, but was, whether calls payable by instalments could be enforced or not? The Commissioner had held that they could not. There was then no case published in England on the subject. In the interval between his decision and the appeal from it, certain cases were published in England, on the authority of which I overruled it, leaving untouched, however, the proposition on which he based it, that the shares should be given up to the assignees of the bankrupt.

Under these circumstances, I must take it that it was competent for the assignees in this case, at the time the proof was tendered, to have insisted that these shares should have been sold, and their value taken into account as between them and the Company, or it was competent for them to have had the transmission of the shares to them authenticated by a declaration in writing, under the provisions of the 18th section of the Companies Clauses Consolidation Act. But the question now is, whether, after what has occurred, and under the circumstances now before me, I am to carry out this transaction, if I can do so, and carry it out, not by applying the machinery of the Act of Parliament, and saying that the shares now ought to be sold for the benefit of the assignees, but whether I am to carry it out to the extent of placing the assignees in the position of shareholders of these shares, as if they had paid up the calls due at the time of the bankruptcy; or, in other words, whether I am to consider them as *quasi* purchasers

(a) 6 Rail. Cas. 9.

(b) See 1 Ir. Ch. Rep. 654.

1853.

*Chancery.*

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COMPANY.*Judgment.*

of these shares—in fact that they are to hold them as a purchaser would have held them if they had been sold—that is to say, discharged from all calls, except those due subsequent to the day of sale? That is, I think, putting the equity of the petitioners as high as it can be put.

The Company appear to have been advised that it would have been a good thing for them to get rid of the proof, and they applied lately to the Commissioner of Bankrupts in England to allow them to withdraw the proof, and to have the order allowing them to prove rescinded. That was refused by the Commissioner, though he did not determine the question now before me.

Now, had that question arisen merely upon the calls, and at the time when the bankruptcy took place, after the Company had said that they had no security for the debt, it might be contended that they had thereby declared that they did not look to the shares for payment of the debt in that way, and that they could not afterwards insist upon selling the shares, as being securities; in other words, that they could not, after so proving against the bankrupt's estate, turn round and treat the shares as a security, and sell them, to pay off any thing due on the calls. But that is not the question I am now asked to determine. The question, as I have stated before, is, whether the petitioners are entitled now, upon paying the amount of the dividend, together with the calls since declared, to have the shares? In order to determine the rights of the parties, I must look to the terms of the Act of Parliament, and see what it prescribes; because every thing in a case such as this must turn on the language of the Act peculiarly applicable to it, which is in fact a code of itself, and which I cannot go out of, if the terms of it are clear.

The first question to be considered is, what has been the dealing with these shares? Now the assignees of the bankrupt never took them until they asked to do so lately, in July 1852. They never decided on having their title certified or authenticated—they never sought any benefit from the shares: they left them, as it were, derelict, to abide the fate of whatever might happen. The effect of that was not that they did not still continue to be the property of the bankrupt. In point of fact, the bankrupt was the person

who might have been sued for the subsequent calls, and he could not have defended himself by reason of his bankruptcy. That has been decided in the case of *The South Staffordshire Railway Company v. Burnside (a)*. In that case a shareholder having become bankrupt, afterwards and before he obtained his certificate, calls were made. The assignees possessed themselves of the surplus, and a correspondence took place between the official assignees and the trade assignees, in the course of which the latter sent the former a statement of the bankrupt's property, comprising in it the value of the shares, and resulting in an estimate of the probable amount forthcoming to work the fiat and pay dividends. The trade assignees subsequently wrote to the official assignees, suggesting the propriety of selling the shares, which continued in the possession of the official assignees; and it was held, first, that there was no evidence to warrant a jury in concluding that the assignees had accepted the shares; and secondly, that the property in the shares continuing in the bankrupt, the claim of the Company for the calls subsequently to the bankruptcy was not barred by his certificate, not being proveable as a debt due *in futuro*, under the 51st section, or a debt due on a contingency, within the meaning of the 56th section of the 6 G. 4, c. 16.

Now, that case decides that these shares have remained, and remain to this hour, the property of the bankrupt, whether he has got his certificate or not. I do not know whether the bankrupt in this case got his certificate; that does not appear in the case. What effect that might have in the case, I am not exactly, at the present moment, prepared to decide. However, as between the bankrupt and the Company, undoubtedly the property has ceased to exist, because the shares have been forfeited, and so far as he is concerned, he has no property in them, save what might result from a sale, in the event of one, which would produce a surplus. A curious question would then arise—who would be entitled to the surplus? I merely refer to the case of *South Staffordshire Railway Company v. Burnside*, which was not mentioned in the argument, to endeavour to get at the position of the shares as they

1853.  
*Chancery.*  
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1853.  
*Chancery.*  
 TURNER  
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 COMPANY.  
 —  
*Judgment.*

now stand. The shares are treated in that case as resembling the interest of a lessee in a lease. Parke, B., says:—"The situation of the bankrupt in this respect bears a close resemblance to that of a lessee who has become bankrupt, who continues liable, after his certificate, to the payment of rent accruing after the bankruptcy. The contract to pay rent *in futuro* is not a debt contracted at the time of the bankruptcy, and cannot be proved under the fiat against him." In a previous part of his judgment, Parke, B., had said:—"The property in the shares, therefore, continuing in the bankrupt, the next question is, whether the Company are barred by his certificate, on the ground that this was a debt proveable under the fiat as a debt due *in futuro*, under the 51st section, or on a contingency within the meaning of the 56th section of the 6 G. 4, c. 16?"

Thus it was laid down distinctly by Baron Parke, in that case, that the property in the shares continued in the bankrupt. What the assignees ask to do in this case is, not to have themselves entered *pro forma*, as deriving title under the bankruptcy, but to have themselves declared entitled to a share of the dividends, and the benefit derivable from the Company, and to be placed in a position to warrant them in saying upon a sale—"We may transfer these shares to the vendee." Now, the right of a holder of shares to transfer a title to them is provided for, and limited in express terms by the Act of Parliament. The 16th section provides that "No shareholder shall be entitled to transfer any share, after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls, for the time being, due on every share held by him."

That provision has been acted on in the recent case of *In re Hall* (a), where it was held that the effect of the 16th section of the 8 Vic., c. 16, is to disqualify any shareholder from an effectual transfer of his shares whilst any call remains unpaid; and the secretary is not in such a case bound to register a deed of transfer of such shares. A similar provision is contained in the Act, with respect to the payment of dividends. By the 126th section, it is enacted that "previously to every ordinary meeting at which a

(a) 7 Rail. Cas. 502,

dividend is intended to be declared, the directors shall cause a scheme to be prepared, showing the profits," &c. ; and by the 123rd section it is enacted that "no dividend shall be paid in respect of any share, until all calls then due in respect of that and every other share, held by the person to whom such dividend may be payable, shall have been paid."

Now, unless the proof in the bankruptcy satisfies these provisions, it does occur to me that the assignees could not sell any claim, by reason of dividends, or insist on their title to transfer the shares, unless upon payment of the sums due for calls. The case of bankruptcy is not provided for by any section. There is no allusion to it, nor is there any thing from which it can be affirmatively averred that the proof in bankruptcy and the receipt of a dividend amounts to the payment of the whole sum.

It does appear to me, therefore, to be very difficult to give effect to any substantial rights claimed by the assignees in this case. The question is one of novelty. It is true that there is a very great difficulty to be encountered by the Company, arising from the stringent provisions of the bankrupt code, with respect to securities on the property of the bankrupt. But, on the other hand, there are the stringent provisions of the Act of Parliament, which make the payment of the calls a condition precedent to the right to transfer the shares or receive the dividends. It appears to me to be more consistent with common justice, and common sense, not to give effect to this claim to the title to the shares, and to the dividends and profits of the concern—a claim which the Act of Parliament does not, and which it appears to me it ought not to provide for, made on behalf of these assignees, who for four years entirely abandoned the shares, during which time they continued the property of the bankrupt. The petitioners are seeking to get the benefit of the industry and resources of others. I find that the words of the Act of Parliament are against that claim ; and I do not think I am bound, at this distance of time, to give effect to rights which, if the assignees had thought proper, they might have asserted in 1847.

Upon these grounds, I am of opinion that unless they are content to pay up the entire balance due on these shares, the petition must be dismissed with costs.

1853.  
*Chancery.*  
TURNER  
v.  
DUBLIN AND  
BELFAST  
RAILWAY  
COMPANY.  
*Judgment.*

1854.  
Rolls.

JOHN THOMAS ROSSBOROUGH, and MARY GREY  
WENTWORTH ROSSBOROUGH his Wife,

v.

THOMAS BOYSE and JANE STRATFORD BOYSE his Wife.

JOHN THOMAS ROSSBOROUGH, now JOHN THOMAS  
COLCLOUGH, and MARY GREY WENTWORTH  
ROSSBOROUGH his Wife,

v.

THE REV. RICHARD BOYSE, Executor of THOMAS BOYSE,  
deceased.

May 17.

June 5.

(In the Rolls.)

A decree declared a will null and void, and directed an account of by-gone rents, and that the defendants, A and B his wife, should, within a month after the date of the Master's report, pay to the plaintiffs the sum which the Master should report to be due on such account. A died, and the suit was revived against his executor; but after A's death, and before the revivor, B filed a further discharge in the Master's office. *Held*, that the decree did not impose a several liability on B; and the Court refused an order that she should pay the sum found due by the report.

THE LORD CHANCELLOR, having refused the motion for a new trial in this case (a), pronounced the following decree on the 17th of April 1853:—

"This cause coming on, on the 13th and 31st days of January 1852, to be heard and debated before the Right Honorable the Lord High Chancellor of Ireland, in the presence of Counsel learned on both sides, and the pleadings in this cause being opened; upon debate of the matter, and hearing the several proofs made in this cause

A decree, directing a husband and wife to pay a sum of money, imposes a joint liability on them, which may be enforced during the husband's life; but it does not impose a several liability on the wife, nor can it be enforced against her after the husband's death.

If a decree directs a sum of money to be paid, ascertained by a report made or to be made, the report is, by reference, to be considered incorporated in the decree; and the report and decree may be enrolled under the 41 G. 3, c. 90, s. 36.

The Court of Chancery cannot determine the validity of a will of real or personal estate. It can only remove impediments to an ejectment at law, to try the validity of a devise of real estate, and cannot direct an issue *devisavit vel non*, unless the defendant consents.

*Semle*—Where one of the defendants is a *feme covert*, and the suit is respecting her inheritance, the consent of her Counsel to the direction of such an issue would not be binding on her.

(a) *Vide ante*, p. 519.

read, and what was alleged by the said Counsel, it was ordered by his Lordship, that the said parties should proceed to a trial at law, at the then next Summer Assizes, to be held for the county of Wexford, by a special jury of the county, upon the following issue:—  
 ‘Whether the paper writing in the pleadings mentioned, bearing date the 6th day of August 1842, and marked with the letter B, is or not the last will and testament of Cæsar Colclough, deceased, in the pleadings named?’ And it was further ordered, that the Judge before whom such trial should be had was to certify to this Court the verdict which should be had upon such trial; and on the return of such Judge’s certificate, such further order should be made as should be just. And the said issue was accordingly tried at the said Summer Assizes for the county of Wexford; and the jury, by their verdict, found that the document bearing date the 6th day of August 1842 was not the last will and testament of Cæsar Colclough, deceased. And this cause coming on this present day to be heard before the Right Honorable the Lord High Chancellor of Ireland, for further directions, and as to the matter of costs, in the presence of Counsel learned on both sides; upon opening and debate of the matter, and hearing the decretal order, bearing date the 31st day of January 1852, as also the certificate of the Honorable Baron Pennefather read, and what was alleged by the said Counsel; and it appearing, by the finding of the jury, that the paper writing, bearing date the 6th day of August 1842, is not the last will and testament of Cæsar Colclough, the alleged testator in the pleadings named—the Court doth declare that the same is null and void, as a devise of the real and freehold estates of the said Cæsar Colclough, in the pleadings mentioned, or any part thereof. And it is further ordered, that an injunction do issue to the Sheriff of the county of Wexford, to put the plaintiffs, John Thomas Rossborough and Mary Grey Wentworth Rossborough his wife, the heiress-at-law of the said Cæsar Colclough, into possession of the said freehold estates in the said county. And it is further ordered, that the said defendants do deliver up, on oath, all deeds, documents, title-deeds, papers and writings, in their or either of their custody or power, relating to the said estates. And it is further ordered, that it be

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*Rolls.*  
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 BOYSE.  
*Statement.*

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*Rolls.*  
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*Statement.*

referred to Edward Litton, Esq., the Master in this cause, to take an account of all sums received by the said defendants, or either of them, or for their or either of their use, for or on account of the rents and profits of the said estates, which accrued due since the 7th day of September 1843, being six years prior to the time of filing the plaintiffs' bill in this cause; and the better to enable the said Master to take the said accounts, the parties are to produce, on oath, all deeds, books, papers or writings, relating thereto, in their custody or power, and are to be examined on interrogatories, as the said Master shall direct; who, in taking the said accounts, is to make unto the said parties all just allowances. And it is further ordered, that the said defendants do, within one month after the date of the said Master's report, pay to the plaintiffs the sum which the said Master shall report to be due, on such account, to the plaintiffs. And it is further ordered, that the said defendants do pay to the plaintiffs their costs of this suit, when taxed and ascertained, including the costs of the issue at law, and of the account hereby directed. And it is further ordered, that it be referred to one of the Taxing-masters of this Court to tax the said costs. And it is further ordered, that the said plaintiffs be at liberty, if necessary, to apply to the Court for further directions."

On the 30th of July 1853, an application was made by the plaintiffs, that the leading order of the 31st of January 1852 (a) might be amended *nunc pro tunc*, by inserting therein, after the words, "his Lordship doth order," and before the word "that," the words, "the defendants, by their Counsel, so consenting;" and by adding to said order, that the defendants consented to the same being granted in the terms thereof. The Court ordered that the said order should be amended, by inserting the words, "and the defendants' Counsel not objecting."

In January 1854, Thomas Boyse died; a bill of revivor was filed by the plaintiffs against his executor in March 1854; and the cause was revived on the 19th of April 1854. The account of the rents was pending before the Master, when Thomas Boyse died; and after his death, and before the suit was revived, the defendant Jane

(a) *Ante*, p. 490.

Stratford Boyse filed a further discharge to the plaintiffs' charge.

On the 8th of April 1854, the Master made his report, whereby he found that the sums received by the said defendants, or for their use, for or on account of the rents and profits of the said estates which accrued due since the 7th day of September 1843, the period in said decree mentioned, amounted in the aggregate to the sum of £49,714.

And he found that the said defendants were justly and fairly entitled to credit thereout, for the sum of £27,052. 0s. 2d., being the amount justly and fairly paid and disbursed by them out of the sums so received by them as aforesaid; and deducting the sum of £27,052. 0s. 2d., being the credits to which, as aforesaid, the defendants Thomas Boyse and Jane Stratford Boyse were justly entitled, from the gross amount of said rents and profits received. He found that the said defendants received on account of the rents and profits of said estates, since the 7th day of September 1843, after giving credit for all just allowances, the sum of £21,961. 19s. 10d., being the sum admitted by the said defendants' discharge to be due and payable to the plaintiffs.

The plaintiffs moved that, in pursuance of the decree in the first cause, the defendant Jane Stratford Boyse might, within two days, pay to the said plaintiffs, or to their attorney lawfully authorised, the sum of £21,961. 19s. 10d., being the amount found to be due to the said plaintiffs, by the report of Edward Litton, Esquire, the Master in these causes, bearing date the 8th day of April 1854, and payable to them under the decree in the first cause, bearing date the 19th day of April 1853.

Mr. *F. Fitzgerald* and Mr. *Lynch*, in support of the motion, contended that the decree was a joint decree against the husband and wife, and survived against the wife. A judgment at law against husband and wife would survive against the wife: *Rigley v. Lee* (a); *Lee v. Rowkely* (b); *Adams on Ejectment*, pp. 333-34; *Bell v. Saunders* (c); *Smalley v. Kerfoot* (d). And a decree against husband wife was governed by the same rules as a

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(a) Cro. Jac. 356.

(c) 4 Bing., N. C., 96.

(b) 1 Roll. 14.

(d) Andr. 242.

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*Rolls.*  
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 —  
*Argument.*

judgment at law. The decree imposed a joint and several liability at law on the defendants: *Seton on Decrees*, pp. 330, 331; *Shelberry v. Briggs* (a); *Bunbury v. Bolton* (b); *Archbishop of Dublin v. Lord Trimleston* (c); *Ex parte Bishop* (d); *Needham v. Needham* (e); *Burke v. Crosbie* (f). The order sought was merely to carry out the decree, and the validity of the decree could not be disputed on this motion.

Mr. *Lawson* (with whom was the *Attorney-General*) resisted the motion, on the ground that it was irregular and unprecedented: that it was irregular, because the copy of the decree had not the indorsement required by the 104th General Order, and a proper demand had not been made. The demand relied on was made on the 9th of May, by an attorney's clerk, who was not authorised to receive the money: 2 *Dan. Chan. Prac.*, p. 1024; *Gregory v. Hand* (g); *Ex parte Batten* (h). The plaintiffs, by reviving the suit, had admitted that the liability did not continue against the personal representatives of the husband. Whether the original decree were erroneous or not, the cause should have been set down on further directions, before the order sought could be obtained. During the life of the husband, the decree could not be enforced personally against the wife, and the order sought would therefore attach a new incident to the decree, and vary the decree by giving a right to the plaintiffs which they had not before, and which, if it existed, should be declared on further directions: 2 *Dan. Ch. Pr.*, p. 1442; *Lord Shipbrooke v. Hinchinbroke* (i); *Jackson v. Rawlings* (k). A personal decree against a married woman for payment of money was erroneous, and it was sought to perpetuate the error: *O'Connell v. M'Namara* (l); *Daly v. Daly* (m); *Stamer v. Nesbit* (n); *Lawrence v. Berny* (o); *Hulme v. Tenant* (p); *Nantes v.*

(a) 2 Vern. 249.

(c) 13 Ir. Eq. Rep. 338.

(e) 1 Hare, 633.

(g) 2 Ir. Eq. Rep. 93.

(i) 13 Ves. 387.

(l) 3 Dr. &amp; W. 411.

(n) 3 Jones &amp; Lat. 447.

(b) 1 Br., P. C. C., 434.

(d) 8 Ves. 333.

(f) 1 Ball &amp; Bea. 504.

(h) 1 M'N. D. &amp; De Gex, 82.

(k) 2 Ver. 195.

(m) 2 Jones &amp; Lat. 752.

(o) 2 Ch. Rep. 127.

(p) 1 Br., C. C., 16.

*Conock* (a); *Francis v. Wigzel* (b); *Keogh v. Cathcart* (c); for although on a judgment against husband and wife, execution at law might issue against the person of the wife, Courts of Equity act on a different principle, and never proceed against the person of a married woman.

The report finds that the rents had been received by the defendants. That was in point of law a receipt by the husband: *Harries v. Johnston* (d); *Aylett v. Ashton* (e).

**The MASTER OF THE ROLLS.**

A motion has been made in these causes, on the part of the plaintiffs, that in pursuance of the decree in the first cause, the defendant Jane Stratford Boyse do within two days pay to the said plaintiffs, or to their attorney thereto lawfully authorised, the sum of £21,961. 19s. 10d., which the notice of motion states to be the amount found to be due to the said plaintiffs by the report of Edward Litton, Esquire, the Master in these causes, bearing date the 8th day of April 1854, and which notice further states is payable under the decree in the first cause, bearing date the 19th day of April 1853.

The notice, as framed, is calculated to mislead the Court.

The first matter in the notice, calculated to mislead, is the title of the second cause, to which Mrs. Boyse's name has been introduced as defendant. She is no party to that suit. The second matter in the notice, calculated to mislead, was the omission of the fact that the report did not find the sum of £21,961. 19s. 10d. to be due by Mrs. Boyse, but found that sum to be due by Thomas Boyse, who was dead at the date of the report, and by his wife, the said Mrs. Boyse. The decree of the Lord Chancellor, which was made when Thomas Boyse was living, ordered the defendants (that is, Thomas Boyse, and Jane Stratford Boyse, his wife) to pay to the plaintiffs, within one month after the report to be made under the

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June 5.  
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(a) 9 Ves. 189.

(b) 1 Mad. 258.

(c) 12 Ir. Eq. Rep. 215.

(d) 3 Y. & Col., Ex., 583.

(e) 1 M. & Cr. 105.

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*Judgment.*

reference thereby directed, the sum which the Master should report to be due to the plaintiffs.

Thus, there is no decree that Mrs. Boyse (a married woman) should pay the debt of her husband, nor is there any report that the sum of £21,961. 19s. 10d. was or is due by Mrs. Boyse. The sum is reported to be due by her husband (deceased) and her—a matter of some importance, when it is kept in mind that the second cause, to which she is no party, is a bill of revivor against the executor of Mr. Boyse.

The facts of the case are as follow :—The late Cæsar Colclough, Esq., made his will on the 6th of August 1842, executed and attested as by law required, and he thereby gave and devised all and singular his real and personal estate to his wife, the defendant Jane Stratford Colclough, her heirs, executors, administrators and assigns, to and for her and their absolute use and behoof, and appointed her executrix of his will. Cæsar Colclough died on the 23rd of August 1842, leaving the defendant Jane Stratford Colclough him surviving. He was seised in fee, at the time of his decease, of considerable real estate in Ireland, and also of certain lands in England. On the 6th of January 1846, the said Jane Stratford Colclough married Thomas Boyse. The bill in the first cause was filed in September 1849, by Mr. and Mrs. Rossborough (Mrs. Rossborough claiming to be the heiress-at-law of the late Cæsar Colclough, deceased), against the said Thomas Boyse and the said Jane Stratford Boyse, praying that the will of the said Cæsar Colclough, bearing date the 6th of August 1842, might be set aside and declared void, and delivered up to be cancelled, and that, if the Court should think fit, an issue might be directed to the county of Wexford, to try the validity of the said will; or that the said John Thomas Rossborough and Mary Grey Wentworth, his wife, might be at liberty to proceed at law by ejectment, for the recovery of the estates devised by the said will, and for general relief.

Thomas Boyse and Jane Stratford Boyse put in their joint answer to the said bill, and witnesses were examined on both sides; and on the 31st of January 1852, an order was made in the cause, directing that an issue should be tried before a jury of the county of

Wexford, "whether the paper writing, dated the 6th of August 1842, was or was not the last will and testament of the said Cæsar Colclough the testator?" The learned Judge who tried the case certified to the Lord Chancellor, on the 13th of October 1852, that the issue had been tried at the previous Summer Assizes for the county of Wexford, and that the jury had found that the will bearing date the 6th of August 1842 was not the last will and testament of Cæsar Colclough, deceased.

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There is no note of the charge of the learned Judge who tried the case in the appendix to the case now before the House of Lords. On the 18th of April 1853, a motion having been made for a new trial of the issue, the motion was refused by the Lord Chancellor, and a decree bearing date the 19th of April 1853 was made. The decree recites that, "It appearing by the finding of the jury that the paper writing in the pleadings mentioned, bearing date the 6th day of August 1842, is not the last will of Cæsar Colclough, the alleged testator in the pleadings named, the Court doth declare that the same is null and void as a devise of the real and freehold estates of the said Cæsar Colclough, in the pleadings mentioned, or any part thereof; and it is further ordered that an injunction do issue to the Sheriff of the county of Wexford, to put the plaintiffs, John Thomas Rossborough and Mary Grey Wentworth Rossborough, his wife, the heiress-at-law of the said Cæsar Colclough, into possession of the estates in the said county;" and after directing the delivery up of deeds, the decree proceeds as follows:—"And it is further ordered, that it be referred to Edward Litton, Esquire, the Master in this cause, to take an account of all sums received by the said defendants (*i. e.*, Thomas Boyse and Jane Stratford Boyse, his wife), or either of them, or for their or either of their use, for or on account of the rents and profits of the said estates, which accrued due since the 7th day of September 1843, being six years prior to the time of filing the plaintiffs' bill in this cause. And it is further ordered that the said defendants (*i. e.*, Thomas Boyse and Jane Stratford Boyse, his wife) do, within one month after the date of the said Master's report, pay to the plaintiffs the sum which the said Master shall report to be due on such account to the

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plaintiffs; and it is further ordered that the said defendants (*i. e.*, Boyse and wife) do pay to the plaintiffs their costs of this suit, when taxed and ascertained, including the costs of the issue at law, and of the account hereby directed."

The plaintiffs having, I presume, some misgiving, after the decree had been pronounced, as to the course which had been adopted, of directing an issue of *devisavit vel non*, in a suit instituted by the heiress-at-law of the testator; and it being clear that the decree declaring the will null and void, as a devise of the real and freehold estates of the testator, could not be sustained in such a suit, unless the issue was directed with the consent of the defendants, an application was made, after the trial and after the decree, to amend, *nunc pro tunc*, the order of the 31st of January 1852, directing the issue, by inserting the words, "the defendants by their Counsel so consenting." The application to amend, by inserting these words, was not granted, but the words, "and the defendants not objecting," were inserted. Without an amendment of the order directing the issue, showing the consent of Mrs. Boyse, or something equivalent to a consent, the whole proceedings, I apprehend, would have been on the face of them illegal and invalid against Mrs. Boyse, and I shall presently show that the consent of the Counsel of a *feme covert*, to surrender her legal rights in relation to her inheritance, is not binding upon her; and if her express consent would not be binding, of course her not objecting to the issue in no way bound her to so irregular a proceeding.

In the month of January 1854, the defendant Thomas Boyse died, the proceedings being then pending before the Master under the reference directed by the decree; and the said Jane Stratford Boyse filed a further discharge in the Master's office, after the death of Thomas Boyse, and filed objections to the report.

A bill of revivor was filed on the 16th of March 1854, to revive the proceedings against the executor of Thomas Boyse. The bill of revivor states that the plaintiffs' solicitor was about to make up the report when Thomas Boyse died. The usual order to revive the suit against the executor was made on the 28th of March 1854.

The Master made his report on the 8th of April 1854, in which

there are the following findings:—"And I find that the sums received by the said defendants (*i. e.*, Thomas Boyse, deceased, and Jane Stratford Boyse), or for their use, for or on account of the rents and profits of the said estates, which accrued due since the 7th day of September 1843 (the period in said decree mentioned), amounted in the aggregate to the sum of £49,714; and I find that the said defendants (*i. e.*, Thomas Boyse, deceased, and Jane his wife) were and are justly and fairly entitled to credit thereout, for the sum of £27,752. 0s. 2d., being the amount justly and fairly paid and disbursed by them out of the sums so received by them as aforesaid; and deducting the sum of £27,752. 0s. 2d., being the credits to which, as aforesaid, the defendants Thomas Boyse and Jane Stratford Boyse are justly entitled, from the gross amount of said rents and profits received, I find that the said defendants (*i. e.*, Thomas Boyse, deceased, and said Jane his wife) received, on account of the rents and profits of said estates, since the 7th day of September 1843, after giving credit for all just allowances, the sum of £21,961. 19s. 10d., being the sum admitted by said defendants' discharge to be due and payable to the plaintiffs."

The motion of the plaintiffs is, that the defendant Jane Stratford Boyse do, within two days, pay to the plaintiffs, or to their attorney lawfully authorised, the said sum of £21,961. 19s. 10d., so found by the report to have been received by the said Jane Stratford Boyse, and her deceased husband, Thomas Boyse.

It has been contended on the part of the plaintiffs that the order now sought is only to carry out the decree; that the order in the decree, that the defendants Thomas Boyse and Jane Stratford Boyse should, within one month after the Master's report, pay to the plaintiffs the sum which the Master should report to be due, was to be considered as a joint and several order, imposing a several liability on Jane Stratford Boyse, and that her liability has not ceased to be a several liability, by the death of Thomas Boyse. The case referred to by the plaintiffs' Counsel on this point is *Ex parte Bishop* (a), in which Lord Eldon appears to have held that a joint order to pay costs was to be considered in equity as joint and

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(a) 8 Ves. 333.

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several. The general rule on that subject is the same in this country.

In the case of *Money Penny v. De Massy* (a), Mr. Yelverton Dawson, Clerk of the Writs, certified to me that the practice in his office has been to issue "separate attachments against plaintiffs upon whom there was an order to pay costs, considering them jointly and severally bound; and the like practice prevailed with respect to defendants, separate attachments not unfrequently issuing against one alone, where others happen to be paupers." The same principle, it is contended by the plaintiffs' Counsel, is applicable, whether the order be to pay costs or any other sum of money.

The decree in this case, however, being that Mr. and Mrs. Boyse should pay, I have inquired from Mr. Dawson as to the practice where the parties, on whom the order is made, stand in the relation of husband and wife, and he has made the following certificate:—

"SIR—I beg leave to certify that in the event of a decree made against the husband and wife, to pay to a plaintiff a sum of money, within a month after the Master shall have made his report ascertaining the sum due, on the report being made ascertaining the sum, and after due service of the decree and report, I would issue a joint attachment or sequestration against the husband and wife, but not separate, and that without further order.

"In the event of the death of the husband, the wife surviving, and the suit being revived against the executors of the deceased husband, I would not take it upon myself to issue an attachment or sequestration against the wife, without the further order of the Court.—I am, Sir, respectfully, yours obediently,

"YELVERTON DAWSON,

"Clerk of Appearances and Writs."

The certificate of Mr. Dawson, as to the practice, appears to me to be in accordance with legal principles; and I am of opinion that if Mr. Boyse were now living, the Court, having regard to the terms of the decree and report, and to the circumstances of this case, to which I shall hereafter more particularly advert, would not be justified in directing any separate process to issue against Mrs.

(a) 1 Ir. Chan. Rep. 604.

Boyse, and that the case of *Ex parte Bishop* has no application where the parties, ordered to pay, stand in the relation of husband and wife.

If, therefore, Mrs. Boyse was not severally liable under the decree, the order now sought is not simply to carry out the decree, but to impose for the first time a several liability upon her, she having survived her husband.

It may, however, be said that, even admitting that she was not severally liable under the decree, yet, her husband being dead, the joint liability has survived against her, and that the object of the present notice is only to carry out the decree.

The answer to that argument is, that the plaintiffs have revived the suit as against the executor of Thomas Boyse, which, if not inconsistent with Mrs. Boyse being at all liable to pay the sum decreed, is inconsistent with the liability arising from survivorship; and, I may observe, that the side-bar order, which should be entered where a liability survives, has not been entered in this case; and, indeed, such a side-bar order would, if it had been entered, be inconsistent with the order to revive against the executor of Thomas Boyse.

The order, therefore, which I am called upon by the plaintiffs to make against Mrs. Boyse, would impose a liability upon her which the Lord Chancellor's decree does not impose—that decree not (in my opinion) declaring her to be severally liable. The question of liability arising from survivorship never having been before the Lord Chancellor, he has not, of course, decided the question. If, therefore, the several liability of Mrs. Boyse was not decided by the decree, and as Mrs. Boyse was under disability when the decree was made, I apprehend she is now at liberty to show that she is neither severally liable nor liable by survivorship.

The object of this motion is to exemplify the order which I am called on to make, under the provisions of the 41 G. 3, c. 90, s. 36, and to enforce the payment of £21,961. 19s. 10d., by the process of the Court of Chancery in England, Mrs. Boyse being resident in that country.

If the argument of the plaintiffs' Counsel be well founded, an

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application might be made to exemplify the decree, report, bill of revivor and order to revive, and the decree could be enforced against Mrs. Boyse. When I inquired why that course was not adopted, the only answer I received was, that the statute did not authorise the exemplification of a report; but I am of opinion that if a decree directs a sum of money to be paid—ascertained by a report made or to be made—the report is by reference to be considered as incorporated in the decree, and the report and decrees may be exemplified under the statute.

If the several liability of Mrs. Boyse is not established by the decree—which I am of opinion it is not—and if I am now called on to decide whether an order should be made either imposing for the first time a several liability on that lady, or a liability by survivorship, surely I am bound to hear her objections, she not being now under disability. If the question is open to me to decide, it is clear, in my opinion, for the reasons which I shall now state, that I ought not to make the order sought.

The bill in this cause was filed by Mr. and Mrs. Rossborough, the latter claiming as heiress-at-law of the late Mr. Cæsar Colclough. I have already stated the prayer of the bill.

The object of the suit was, that the will of the said Cæsar Colclough, in favour of Mrs. Boyse, should be set aside and declared void, and delivered up to be cancelled.

An issue of *devisavit vel non* was directed by the order of the 31st of January 1852. I have already stated the result of that issue and the decree.

It is, I apprehend, clear—unless Mrs. Boyse, who was under coverture when the issue was directed and the decree was made, is bound by reason of her Counsel not having objected to the issue—that the entire proceeding has been contrary to law.

In *Jones v. Jones* (a), the bill was as here, by the heir-at-law; and the law is thus laid down by Sir William Grant:—"It is impossible that at this time of day it can be made a serious question whether it be in this Court that the validity of a will, either of real or personal estate, can be determined? There is, however, an

(a) 3 Mer. 171.

alternative prayer that the Court will direct an issue to be tried, and then certain other directions are sought as applicable to that alternative. Now, although there may have been instances of issues directed on the bill of an heir-at-law, where no opposition has been made to that mode of proceeding, yet I apprehend he cannot insist on any such direction. He may bring his ejectment, and if there be any impediments to the proper trial of the merits, he may come here to have them removed; but he has no right to have an issue substituted in the place of an ejectment." Sir William Grant decided that case on the ground which he thus stated, and the authority of that decision has never been questioned, that I am aware of.

1854.  
Rolls.  
ROSSBOROUGH  
v.  
BOYSE.  
Judgment

In a recent case in England, between the parties to the present record, viz., *Boyse v. Rossborough*, reported in *Kay's Reports*, vol. 1, p. 71, the question arose before Sir W. P. Wood, whether a devisee of real estates could maintain a bill to establish a will of real estate against the heiress-at-law. Vice-Chancellor Wood pointed out and explained (pp. 105, 106), the distinction between the cases where the heir-at-law was plaintiff and where he was defendant.

The law on this subject is, I apprehend, so entirely free from doubt, that it would be a waste of public time further to discuss the question.

It is therefore now necessary to consider, whether the fact that Mrs. Boyse's Counsel (she being a *feme covert*) did not object to the order directing the issue, binds her.

I am of opinion that she is not bound by reason of the Counsel for her and her husband, Thomas Boyse, not having objected to the proceedings. Mr. and Mrs. Boyse answered jointly; and he was *dominus litis*.

Even if Counsel had consented to the issue, I apprehend she would not have been bound.

In the case of *Turner v. Turner* (a), the bill was filed to establish a will against Mrs. Merewether, the heiress-at-law of the testator, who, with her husband, were defendants. They joined in

(a) 2 De Gex, M'N. & Gor. 28.

1854.  
*Rolls.*  
 ROSSBOROUGH  
 v.  
 BOYSE.  
 Judgment.

their answer, and an order was made on the 25th of January 1832, whereby an issue of *devisavit vel non* was directed, upon the application of Mrs. Merewether. On the 14th of February 1833, a decree was made in the cause, which, after stating that the defendant Mary Anne Merewether, the heiress-at-law of the testator, by her Counsel, consented that the order directing the issue should be discharged, it was accordingly discharged, and the will was declared well proved.

A petition for re-hearing having been presented by Mrs. Merewether, it was taken off the file by the Master of the Rolls; but that order was reversed by the Lords Justices, and the cause was re-heard before them. Lord Justice Bruce, having adverted to the particular circumstances which led to the consent by Counsel on the part of Mrs. Merewether, proceeded as follows (a):—

“The decree recites that the wife consents by her Counsel. It may be said that the consent of a married woman by her Counsel, distinct from her husband, she having defended the suit with him and by him, and not separately, is sheer nonsense; and perhaps it is. Perhaps it is utterly without meaning; but if it has any meaning, it is wrong, because she could not consent, according to the law of the country. Whether these words, however, are mere nonsense or not, they ought to be struck out of the order. . . . But assuming that these words do not prejudice the order, notwithstanding that they seem to form a ground on which it purports to be made, the case still is this—that the husband abandons the right to have an issue to try the validity of the will, as to freehold estates in fee-simple, of his wife’s ancestors. It has been said that the husband is *dominus litis*—that he has the entire conduct of the cause, and that his wife is bound effectually and for ever by what the husband does in it. That, undoubtedly, is a most serious view of the case, considering the guards with which the law of the country in general surrounds a married woman, as to her real estate.”

Lord Cranworth, then one of the Lords Justices, after adverting to the doctrine that a party, not under disability, may be bound by her acts not to apply to re-hear a decree, adds, “Now, suppose

(a) 2 De Gex, M’N. & G. 37.

that doctrine to be most correct, that a party may, by contract or by his conduct, prevent himself from having a right to re-hear, how does that apply to the case of a married woman, who cannot contract, and therefore cannot so act, as that her conduct shall amount to, or be equivalent to, a contract? Is she to be dealt with as if she had contracted? As it is impossible for a married woman, by contract, to prevent herself from having the right to have her cause re-heard, so neither can she do so by her conduct."

Lord Cranworth afterwards said:—"This is a case which, though we believe it practically to be of no importance at all, opens a number of very difficult and somewhat curious questions, namely, as to the rights of a husband, as *dominus litis*, in a suit in which his wife's inheritance is interested. There seems to be very great authority for saying (and all convenience and all analogy to the old proceeding, in respect of real actions, would seem to show, by reason, *a priori*, that this is the state of the law), that if there is a suit against the husband and wife, in respect of the wife's inheritance, and the wife does not, or the husband and wife do not, at the time, desire to have an issue, the Court may declare the will to be proved, just as if she was not a married woman. All convenience, I say, seems to require that this should be the law.

"But assuming it to be the law, that if the wife, or the husband acting for the wife, does not claim an issue at the time the cause comes to a hearing, the wife is bound, still in this case an issue was directed; and then arises this question—an issue having, under these circumstances, been directed, could the husband afterwards present a petition to vary that order, and to get rid of the issue? In my opinion he could not. That was a different proceeding altogether. He did not omit to claim an issue; but having claimed the benefit of an issue, he thought fit afterwards, on his wife's behalf, to compromise the suit, as was pointed out by my learned Brother. That could not be done by analogy to the old form of proceeding in real actions; for although

1854.  
Rolls.  
ROSSBOROUGH  
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BOYSE.  
Judgment.

1854

*Rolls.*

ROSSBOROUGH

v.

BOYSE.

*Judgment.*

the wife was bound in them, yet, when there was a compromise, as, upon a fine or recovery, she was solely and separately examined.

“If the husband could not do it, by his own petition alone, he could not make it at all better by joining the wife as a petitioner, still less can it be entered on the decree that she had consented. It is merely a superfluity of words, that means nothing. What is the effect of the order that was made on that petition of the husband joining the wife with him? I believe we are both of opinion that although inoperative in binding the inheritance, as against the wife, it must be conclusive and binding as against the husband. . . .

“Then the question arises, whether we ought not to provide against the possible injustice to the wife, or those who come after her, of their being precluded from disputing that will after the husband's death. We think that we ought to make such a provision that if, upon his death, Mrs. Merewether, if she should then be alive, or her heir, if she should then be dead, should be minded to dispute this will, they should not be prejudiced by the act of the husband, in having got rid of the order that was made in 1832, for the trial of an issue as to the validity of that will, but that they ought to have the same right as if the order of 1833 had never been made, and the petition had never been presented.”

The decree was accordingly amended, by striking out the consent of the wife by her Counsel.

The consent of the wife, therefore, or the wife not having objected to an issue being directed, and a Court of Equity assuming jurisdiction to try the validity of a will of real estate, cannot, in my opinion, bind her rights.

It may be said that the question arose in that case on a re-hearing, and that although the questions to which I have adverted will be open on the appeal in this case against the order directing the issue and against the decree, now pending in the House of Lords, yet, that on the present motion Mrs. Boyse is not at liberty to raise them.

If the order which I am called on to make was simply to carry

out the decree, I should not, of course, feel at liberty to advert to the questions which I have stated; but I have already observed that the Lord Chancellor has not decided, as I understand the decree, that Mrs. Boyse is severally liable, or liable by survivorship; and if not, I feel very unwilling to make an order affecting Mrs. Boyse, founded on proceedings which I consider contrary to law. It is right to state that I believe the question, that an issue should not have been directed, was not raised or argued before the Lord Chancellor.

It may be said that the objections to the proceedings are of a technical character, and that it was immaterial whether the validity of the will was tried by an issue *devisavit vel non*, or by an ejectment; I am of opinion that the mode of trial was by no means immaterial.

In the first place, if an ejectment had been brought, and the verdict had been against the will, the motion for a new trial would have been to the Court of Law. In the case of *Pemberton v. Pemberton* (a), Lord Eldon, after adverting to the fact that the course upon a bill by an heir impeaching a will is to direct him to bring an ejectment, removing legal impediments arising from outstanding terms, observed, that "the question whether a new trial should or should not be had is discussed with much more satisfaction where the trial was had than in the Court out of which the issue was directed." In the present case, it would have been of much importance to Mrs. Boyse that the motion for a new trial had been made in the Court of Law, as I confess it appears to me, having read the notes of the learned Judge before whom the trial was had, in the printed appendix to the case before the House of Lords, that if there was any evidence to establish undue influence, in the legal sense which that term should receive, according to the case of *Trimleston v. Trimleston*, and other cases, it was so slight as not to justify the verdict. The verdict appears to have been founded on the popular and not the legal notion of undue influence. A more serious injustice has, however, been done to Mrs. Boyse in this case, as the effect of directing an issue, instead of directing an ejectment, has

1854.  
Rolls.  
ROSSBOROUGH  
v.  
BOYSE.  
Judgment.

(a) 13 Ves. 298.

1854.  
*Rolls.*  
 ROSSBOROUGH  
 v.  
 BOYSE.  
 Judgment.

been to conclude her for ever, if the decree shall ultimately stand. The decree declares the will of Cæsar Colclough null and void, and thereby concludes Mrs. Boyse, if it should stand. Whereas if an ejectment had been directed, I apprehend no such decree could with propriety have been made, although judgment on the ejectment had been obtained against Mr. and Mrs. Boyse.

In the case of *Fulham v. Wright* (a), Sir John Leach says:—"It is further to be observed, that the bill filed in this case is not by the devisees, to establish the testamentary instruments, but it is a bill by the heir-at-law, claiming against these instruments." Sir John Leach further said:—"The bill filed in this case is not by the devisees to establish the testamentary instrument, but it is a bill by the heir-at-law, claiming against these instruments, to have a legal estate put out of his way, in order that he may try the validity of these instruments, by ejectment, and no decree in this cause would be conclusive upon the question of the validity of the will. The plaintiff might, by redeeming the mortgage, get in the outstanding legal estate by an assignment of the mortgage; or even upon the hearing on further directions, he might still contend that he ought not to be concluded by the trial of the issues, and that the Court of Equity should still permit him to proceed, by restraining the defendant from opposing to him the legal estates."

Lord Chief Justice Tindal, in giving judgment, said:—"It may be taken to be generally true, that in cases where the devisee files a bill to set up and establish the will, and an issue is directed by the Court upon the question *devisavit vel non*, this Court will not decree the establishment of the will, unless the devisee has called all the subscribing witnesses to the will, or accounted for their absence; and there is good reason for such a general rule. For as a decree in support of the will is final and conclusive against the heir, against whom an injunction would be granted if he should proceed to disturb the possession after the decree, it is but reasonable that he should have the opportunity of cross-examining all the witnesses to the will, before his right of trying the title of the devisee is

(a) 2 Russ. & M. 1.

taken from him. In that case, it is the devisee who asks for the interference of this Court, and he ought not to obtain it until he has given every opportunity to the heir-at-law to dispute the validity of the will."

Now, if the heir-at-law, who files a bill against the devisee, and has legal impediments put out of his way, brings an ejectment, and fails, the decree would not establish the validity of the will; so if the heir-at-law obtains judgment in the ejectment, I apprehend that a decree declaring the will null and void would be an improper and erroneous decree. If so, Mrs. Boyse has suffered grievous injustice by the course adopted. If an ejectment had been brought, she would not now be concluded, but might, notwithstanding any decree properly and legally drawn up, bring a cross-ejectment. The order to pay the mesne rates, to be ascertained by the report of the Master, was consequential on the rest of the decree.

Unless, therefore, I am coerced in this case, I should be very unwilling to perpetuate error, and to order Mrs. Boyse to pay a very large sum of money, which she ought not, upon such a record as this, to be held liable to pay.

Assuming, however, that Mrs. Boyse cannot raise the question of the entire illegality of the proceedings against her on this motion, and assuming, therefore, that the order directing the issue and the decree, so far as it declares the will to be null and void, are right, still I apprehend that I ought not to make the order sought for.

The decree, after directing the defendants Mr. and Mrs. Boyse to pay to the plaintiffs, within a month after the Master's report, the sum which the Master should report to be due for mesne rates, further directs Mr. and Mrs. Boyse to pay the costs of the suit and the costs of the issue.

With respect to the latter direction as to costs, it has been decided by the Lord Chancellor, in the case of *Keogh v. Cathcart* (a), that such an order imposes no liability whatever on the wife—that the husband is *dominus litis*, and alone liable for the

1854.  
Rolls.  
ROSSBOROUGH  
v.  
BOYSE.  
Judgment.

(b) 12 Ir. Eq. Rep. 215.

1854.  
Rolls.  
 ROSSBOROUGH  
 v.  
 BOYSE.  
 ———  
*Judgment.*

costs, and that such direction is to be considered in this Court as not subjecting the wife to pay the debt of the husband. I thought in that case that I was bound by the order of the Lord Chancellor, and did not set aside the sequestration against the husband and wife, but my decision was reversed.

If this be so, of course, if I were now to order Mrs. Boyse to pay the costs, which she and her husband were ordered by the Lord Chancellor to pay, such order would be at variance with his Lordship's decision in that case.

If, therefore, I am to make no order against the wife, where the debt is the debt of the husband, the question arises, whether the order in the decree, that Mr. and Mrs. Boyse should pay the rents and profits received by them, or either of them, or for their or either of their use, within one month after the Master's report, bound Mrs. Boyse, or whether the debt is the debt of the husband?

The report of the Master finds that the defendants (that is, Mr. and Mrs. Boyse) received the rents; and the plaintiffs, having taken no objection or exception to the report, are bound by it, and cannot call upon me to say that the rents were received by Mrs. Boyse alone. Even if they were received, in fact, by her, they were received in law for the use of her husband Thomas Boyse, unless there was some settlement, which I have not heard of, settling the Wexford estates to her separate use.

Cases have been referred to as decided at law, in which, in an action of trespass for mesne rates, a husband and wife may be both made liable; but at law, the wife would, in such form of action, be liable for the tort. In equity, however, the question is a matter of account, and the liability a debt; and I have been referred to no case in which an action *ex contractu* at law, or where an account is taken in equity, the wife, surviving the husband, has been held liable personally for sums which she, as the agent of her husband, received in his lifetime, but which he was legally entitled to receive. Mr. Boyse was entitled, in the absence of a settlement of the Wexford estates—and I have heard of none—to receive the rents during the joint lives of himself and Mrs. Boyse, the will of Cæsar Colclough

not having devised such estates to her for her separate use. If, then, Mr. Boyse was the person legally liable, on what ground am I now to make an order against Mrs. Boyse, she having survived Mr. Boyse, and his executor having been made a party to the suit?

1854.  
Rolls.  
ROSSBOROUGH  
v.  
BOYSE.  
Judgment.

If the debt be the husband's, and not the wife's, I am bound, according to the Lord Chancellor's decision in *Keogh v. Cathcart*, to hold that the wife is not liable.

Even if Mrs. Boyse was to be held liable for so much of the rents as she in fact received, the Master has not found how much she received, and how much Mr. Boyse received.

The report finds that Mr. and Mrs. Boyse received the rents; and in the absence of any objection or exception to the report, I shall not inquire whether the finding is according to the fact or not.

On the whole, I am of opinion, that if a supplemental bill were filed to carry into execution the decree against Mrs. Boyse, who has survived her husband, the Court would not be justified in perpetuating error, and carrying the decree into execution against her.

If not, am I, on motion, to make an order to bind her, and to add to the decree and impose a several liability upon her, or a liability by survivorship, which the decree does not impose?

I am of opinion, that I ought not to make the order sought on motion, and that the plaintiffs should set down the cause for further directions, or file a supplemental bill.

But even if the matter ought to be disposed of upon motion, I think the case should be disposed of by the Lord Chancellor, and not by me. If the Lord Chancellor entertains the question on motion, he can stay proceedings on the decree to enforce payment of the £21,961. 19s. 10d., until the appeal in the House of Lords is disposed of, which I cannot; and although it is very unusual to stay proceedings pending an appeal to the House of Lords, yet, I apprehend the illegality of the proceedings in this cause is so apparent, that, as a matter of common justice to Mrs. Boyse, they would be stayed.

I shall be no party to making an order against this lady, which, I think, would be contrary to the first principles of justice; and the plaintiffs must apply to the Lord Chancellor.

1854.  
*Rolls.*  
 ROSSBOROUGH  
 v.  
 BOYSE.  
 Judgment.

I omitted to observe, that the plaintiffs' Counsel stated that Mrs. Boyse, after the death of her husband, filed a further discharge, and took objections to the report; and the plaintiffs' Counsel insisted that she thereby adopted all the proceedings in this cause.

There is, in my opinion, no foundation for the argument. It is quite settled, that a party may appeal against, and consequently complain of, an order directing issues, although the issues have been tried; or against an order of reference to the Master, after the report is made. The cases on that subject are *Butlin v. Masters* (a), and *Parker v. Morrell* (b).

I shall therefore refuse this motion, with costs.

(a) 2 Ph. 291.

(b) 2 Ph. 453.

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NOTE.—The plaintiffs having appealed to the Lord Chancellor, the order was reversed, and the defendant Jane Stratford Boyse was directed to pay to the plaintiffs, the said sum within a fortnight. An appeal is pending in the House of Lords, against the proceedings before the Lord Chancellor.

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CORKER v. RYAN;  
 And the Trustee Act, 1850.

May 15.

The legal estate of a mortgage was vested in two trustees, one of whom was out of the jurisdiction. The Court, in order that the mortgage might be re-conveyed to the mortgagor, pursuant to a decree in a foreclosure suit, made an order under the Trustee Act, that the mortgage should vest in the other trustees solely, and directed the costs of the petition to be costs in the suit.

A MORTGAGE for £900, on the estate of William Ryan, was conveyed to Lynn Carew and Eyre Cooté Baldwin, in trust for H. Baldwin for life, then to secure a jointure for Frances Baldwin his wife, and subject thereto in trust for any child as H. Baldwin should appoint. He executed the power of appointment in favour of his son Philip Baldwin, and afterwards he and Frances assigned and released

all their interest in the mortgage to Philip Baldwin. The deed was acknowledged by Frances Baldwin, pursuant to the Act for the abolition of Fines and Recoveries. Philip Baldwin assigned the mortgage to Corker, to secure £400..

The trustees Carew and Coote were not parties to any of these deeds, and consequently the legal estate remained in them. Coote was resident in America.

A cause petition having been filed for foreclosure against Ryan the mortgagor, Philip Baldwin and Carew, Ryan paid into Court the sum found due by the Master on the original mortgage, and was declared entitled to a re-conveyance.

A petition was presented by Corker, entitled in the cause petition matter, and the Trustee Act 1850, praying that the lands vested in Coote and Carew should vest in Corker alone, in order that he alone might be enabled to re-convey the legal estate, and that Corker might have the costs of the petition as costs in the cause petition matter.

Mr. *R. R. Warren*, for the petitioner, relied on the 10th section of the Trustee Act 1850.

Mr. *J. E. Walsh*, for Philip Baldwin.

The MASTER OF THE ROLLS made the following order :—

Pursuant to the provisions of the Trustee Act 1850, let the several lands of, &c., comprised in the deed of mortgage of the 19th day of August 1840, and now vested in the said Lynn Carew and Eyre Coote Baldwin, vest in the said Lynn Carew and his heirs solely; and let it be referred to one of the Taxing-masters of this Court to tax and ascertain the costs of the petitioner incurred in the matter of said petition, and the proceedings thereunder; and declare the same, when taxed, are to be paid to the petitioner, together with costs in the cause petition matter.

1854.  
*Rolls.*  
CORKER  
v.  
RYAN.  
*Statement.*

*Argument.*

*Order.*

1854.

*Rolls.*

May 14.

June 3.

## THE QUEEN v. DILLON.

The costs of the appointment of a receiver on a judgment on a receiver's recognizance, under the 4 & 5 W. 4, c. 55, and 3 & 4 Vic., c. 105, are chargeable beyond the penalty of the recognizance against the receiver, and *semble*, against his sureties, those costs not being costs at the Petty-bag side of the Court.

*Statement.*

On the 27th of April 1837, James Dillon, together with Edward M'Donnell and William Davis, as his sureties, entered into a recognizance in the penalty of £1800, conditioned that James Dillon should duly account as receiver in the matter of Higgins minors. James Dillon having made default, proceedings by *scire facias* were had, and judgments were obtained on the recognizance in the Petty-bag side of the Court, in Michaelmas Term 1842; and on the 1st of May 1843, a receiver was appointed over the lands of Brackoon, the property of James Dillon, under the 4 & 5 W. 4, c. 55, and 3 & 4 Vic., c. 105. The lands of Brackoon were ordered to be sold in the Incumbered Estates Court, and a reference having been made by that Court to their Master to ascertain the sums due on foot of the recognizance, he, by his report, bearing date the 25th of February last, found that the sum of £1366. 8s. 8d. was due on foot thereof, after giving credit for £366. 1s. 1d. stock, and £72. 10s. 3d. cash, which had been realised in the receiver matter; and he found that Constantine Rodolph Baron De Hasseler, and Mary Jane his wife, were entitled to one moiety of the said sum of £1366. 8s. 8d., subject to one moiety of the costs payable to Richard Meade, Esq., as late solicitor for minors, for proceedings instituted in reference to said recognizance; and that Emma Julia Higgins was entitled to the other moiety of said sum, subject to a like moiety of the said costs—being of opinion that these costs, and the costs of the appointment of the receiver in this matter, did not come within the order of reference to him, and if recoverable, should be recovered out of the funds in the Chancery matter.

The costs payable to Mr. Meade were costs incurred by him as solicitor for minors, in proceeding to appoint a receiver over the estate of William Davis, one of the sureties of the receiver. The

proceedings were abandoned, but the costs of them were ordered to be costs in this matter.

The Baron and Baroness De Hasseler and Emma J. Higgins moved that they might be declared entitled to the costs properly and necessarily incurred in this matter—for a reference for taxation of them, and for an order on the receiver to pay them out of funds in his hands. The costs sought for were the costs of the appointment of the receiver in this matter, and certain proceedings consequential thereon, and Mr. Meade's costs.

The motion had been made in Michaelmas Term 1853, and stood over for the report of the Master of the Incumbered Estates Court.

Mr. *D. Sherlock* and Mr. *Palles*, in support of the motion, relied on 4 & 5 *W. 4*, c. 55, ss. 1, 38, and 3 & 4 *Vic.*, c. 105, s. 21, and the 155th Rule of March 1843, as entitling the parties to the costs, notwithstanding the general rule that costs are not payable beyond the penalty of the recognizance.

Mr. *Deasy* and Mr. *Vance* opposed the motion, citing *Maunsell v. Egan* (a); *Keily v. Murphy* (b); *Watters v. Watters* (c); *Feely v. Kilkenny* (d).

#### THE MASTER OF THE ROLLS.

In this case an application has been made on behalf of Rodolph Constantine Baron De Hasseler, and Mary Jane his wife, and also on behalf of Emma J. Higgins, that the said Mary Jane De Hasseler may be declared entitled to the costs properly and necessarily incurred in this matter, including the costs of the motion standing over from the 7th of December last; and that it may be referred to one of the Taxing-masters to tax and ascertain the same, and that upon taxation thereof, John Treston, the receiver in this matter, do pay the same out of the funds in his hands, as such receiver, and have credit for the same, in passing his account in this matter.

(a) 9 Ir. Eq. Rep. 283.

(b) *Sau. & Sc.* 429.

(c) 11 Ir. Eq. Rep. 335.

(d) 10 Ir. Eq. Rep. 443.

1854.  
Rolls.  
THE QUEEN  
v.  
DILLON.  
Statement.

Argument.

June 3.  
Judgment.

1854.  
*Rolls.*  
 THE QUEEN  
 v.  
 DILLON.  
*Judgment.*

The facts of the case, so far as they are material, are as follow :—On the 27th of April 1837, James Dillon, together with Edward M'Donnell and William Davis, as his sureties, entered into a recognizance conditioned that the said James Dillon should duly account as receiver in the matter of Higgins minors. The penalty of the recognizance was £1800. James Dillon made default, and the recognizance was ordered to be put in suit, by an order bearing date the 30th of April 1842.

In Michaelmas Term 1842, three several judgments were obtained on foot of said recognizance, at the Petty-bag side of the Court. By an order bearing date the 31st of March 1843, made in the matter of the Queen, on behalf of Thomas Gould, Esq., one of the Masters, and guardian of the fortunes of the minor, under the Acts 5 & 6 *W.* 4, c. 55, and 3 & 4 *Vic.*, c. 105, it was ordered, that a receiver should be appointed to receive the rents and profits of the lands of Brackoon, which have been since ordered to be sold in the Incumbered Estates Court, the property of the said James Dillon the receiver, or a competent part thereof, to pay the sum of £1160. 9s., due on foot of said recognizance, with interest thereon, unless cause was shown to the contrary. The order was made absolute on the 1st of May 1843, and John Treston was appointed receiver. Proceedings were also taken by Richard Meade, as general solicitor for minors, to appoint a receiver over the estate of the said William Davis, one of the receiver's sureties, but the said proceedings were afterwards abandoned, and it was ordered that the costs of them should be costs in this matter.

The amount due by the receiver, on foot of the recognizance, has been ascertained by the report of the Master in the Incumbered Estates Court, to be £1366. 8s. 8d., after giving credit for a sum of stock equivalent to £366. 1s. 1d., and a sum of cash amounting to £72. 10s. 3d., making together the sum of £433. 4s. 11d.

The costs sought by the present application are the costs of the appointment of the receiver, and certain proceedings consequential thereon.

It was argued before me, that according to the decision of Sir

Michael O'Loghlen, in the case of *Keily v. Murphy* (a), which I followed in *Watters v. Watters* (b), these costs were not recoverable. But in *Keily v. Murphy*, the costs adverted to by Sir Michael O'Loghlen were costs incurred on the Petty-bag side of the Court, not costs under the Sheriffs' Act, as in this case. The same observation applies to *Watters v. Watters*. Sir Michael O'Loghlen held, in *Keily v. Murphy*, that the statute 21 & 22 G. 3, c. 20, which gave costs to the Crown, did not apply to the costs of proceeding upon a tenant's recognizance; and although the case of *Keily v. Murphy* was observed upon by Lord St. Leonards, in *The Queen v. Bayley* (c), he did not depart from *Keily v. Murphy*, on the construction of the statute of the 21 & 22 G. 3.

It would appear, however, from the 1st and 38th sections of the 5 & 6 W. 4, c. 55, and the 21st section of the 3 & 4 Vic., c. 105, that the costs incurred in the Court of Chancery for the appointment of a receiver are payable, and the 155th General Order of March 1843 appears to recognise that the costs incurred in the Court of Chancery are payable.

I have had inquiry made from the Taxing-masters, and I understand that in practice the costs in question are taxed by them, although the proceeding be on foot of a receiver's recognizance, entered into by the Crown.

It is to be observed that this is not an application to make sureties responsible beyond the amount of the recognizance. The application is against the property of the defaulting receiver.

There may be some doubt in the case, but on the whole, I am of opinion that I should make the order.

(a) San. & Sc. 479.

(b) 11 Ir. Eq. Rep. 335.

(c) 1 Dr. & War. 213; S. C., 4 Ir. Eq. Rep. 142.

1854.  
Rolls.  
THE QUEEN  
v.  
DILLON.  
Judgment.

1854.  
Rolls.

April 20.

May 21.

EDIE v. BABINGTON.

A fund was bequeathed in trust for the separate use of A for life, and that she should be at liberty to dispose of it by her last will and testament, provided the power should not be exercised in favour of B. A, having survived her husband, made a will appointing the fund. Held, that the appointees were trustees for creditors of A, and the fund assets for payment of his debts.

The rule that where a general power of appointment is exercised in favour of a volunteer, he is a trustee for the creditors of the appointee, holds, where the power is to be exercised by will only.

A power is general, though there be a restriction against exercising it in favour of one person.

ISAAC TODD, by his will, bearing date the 18th of June 1815, bequeathed to trustees the sum of £8000 late currency, in trust for the use and benefit of his daughter Eleanor (who afterwards married John Chambers), for her separate use for life, and directed that at her decease two full third parts of said sum of £8000 should be and remain for the use and benefit of the child and children of the said Eleanor, if any she should have, and the remaining one-third thereof she should be at liberty to dispose of by her last will and testament; and failing such disposition, the remaining third should go to the use and benefit of her child or children in equal proportions.

The will contained a proviso that the power thus given to Eleanor Chambers should not be exercised in favour of a person of the name of John Bateman.

Isaac Todd died in 1819, and John Chambers in 1845. Eleanor Chambers made her will in 1846, which is stated more fully in his Honour's judgment, and by which she bequeathed two legacies, and she bequeathed the residue to her daughter Elizabeth and her issue. Elizabeth married James Stuart, on the 17th of March 1850, and a settlement was executed on the marriage.

The petition was filed by a creditor of Eleanor Chambers, for the administration of her estate, and the Master, by his decretal order, dated the 30th of January 1854, declared that the one-third of the sum of £8000, appointed by the will of Eleanor Chambers, constituted assets, and ought to be applied in payment of her debts. The respondents, the appointees under the will, appealed from the decretal order.

Argument.

Mr. F. Fitzgerald and Mr. J. O'Hagan, in support of the appeal.

The question which arises upon this appeal is, whether personal

property, over which a person has a power of appointment by will only (being entitled also to a life estate in the fund), such power being general, with the exception of one particular person being excluded from the possibility of being an object of it, will, when the power is exercised, be assets for payment of the appointor's debts. It is indisputable, that if a person has a general power of appointment, by deed or will, and exercises the power, the property thereby becomes assets for payment of the debts of the person so appointing; but the present case is to be treated as an exception from this general rule, upon two grounds—first, that the power was to appoint by will only; secondly, that this is not a general power, there being a particular party excluded from the possibility of enjoying any thing under it. The principle which, in the case of a general power, makes the property assets of the appointor, is, that he can, at any time, by executing the power, make the property his own, where the execution is to be by deed or will, or by deed only; but where it is to be executed by will only, the donee cannot, at any time during his life, convert it into his absolute property, and therefore, the principle upon which the equity is founded fails. If a power is to be exercised by will, an execution by deed will not be carried into effect by a Court of Equity, as a defective execution to be aided: *Roberts on Frauds*, p. 330. If this were assets, the intention of the donee of the power would be altogether defeated, the intention evidently being, that the donee of the power should enjoy the dividends or interest of the property for life only; and after his death, that it should be enjoyed by other objects of the donor's bounty—giving to the donee merely a power of selection of the objects; but the donee of the power, by incurring debts in his lifetime, and then appointing by will, would be enabled to absorb the whole. There is no decision against the principle relied on; *dicta* may be cited against it; but the cases in which they were pronounced are distinguishable. They cited and distinguished the following cases:—*Thompson v. Towne* (a); *Buckland v. Barton* (b); *Nail v. Punter* (c), in which there was no trust in default of ap-

1854.  
Rolls.  
EDIE  
v.  
BABINGTON.  
Argument.

(a) 2 Vern. 319.

(b) 2 H. B. 136.

(c) 5 Sim. 562.

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pointment, and which was decided on the principle of a resulting trust: *Jenning v. Andrews* (a); *Williams v. Lomas* (b). The latest case is a decision in favour of the appeal: *Vaughan v. Vanderstegen* (c). That case must have been decided on general principles, as there is no difference in the power which a married woman has over separate property, from that of a male adult.

Secondly, the exception of a particular person as an object of the power shows that the donor intended that the subject of the power should never become the property of the donee. The rule applies only when it is an absolutely general power of appointment, and the exclusion of any one person destroys this generality. The only cases which can be considered as decisions on this point, namely, *Platt v. Routh* (d), *Drake v. Attorney-General* (e), were decided upon a point quite foreign to the present case, namely, whether the Act 36 G. 3, c. 52 (*Eng.*), applied to a power of this kind; and the Master of the Rolls, in his judgment (p. 280), expressly limits his opinion, as to the generality of the power, to the construction to be put on that Act of Parliament.

Thirdly, some of the appellants are parties who claim the fund under a marriage settlement, of a portion of it, subsequent to the death of the appointor. This settlement, although in its inception it might be considered voluntary, yet, is supported by the marriage consideration, and parties claiming under it will be considered as purchasers for value, so as to oust the claims of general creditors of the appointor: *George v. Milbanke* (f); *Hart v. Middlehurst* (g); and marriage consideration is as efficacious in this respect as money: *Prodgeos v. Langham* (h).

Mr. Deasy, and Mr. J. P. Kennedy, for the creditors of Eleanor Chambers.

First.—The first question raised by the appellants is closed by

(a) 6 Mad. 264.

(b) 16 Beav. 1.

(c) 2 Drew. 165.

(d) 3 Beav. 257; 6 M. & W. 756.

(e) 10 Cl. & Fin. 257.

(f) 9 Ves. 190.

(g) 3 Atk. 377.

(h) 1 Sider. 133.

authority. In *Jenning v. Andrews* (a), Sir John Leach expressly states, that a power to appoint by will only is a general power upon which the principle in question will operate; although the text of *Thompson v. Towne* (b) would seem to favour the distinction taken by Mr. *Fitzgerald*; the true grounds of the decision are stated in Mr. *Raithby's note*, and show it to be a decision in our favour. But the late case of *Williams v. Lomas* (c) is an express decision—the only observation made upon it is, that the point was not argued; it does not, however, follow, that because no argument is reported, none took place. Eight Counsel appear to have been heard, and the question of the effect of the appointment was the main point of the case; it must be presumed, therefore, to have been argued. *Vaughan v. Vanderstegen* (d) was evidently decided upon the disability of a married woman, and by establishing the exception, it affirms the general principle. All the text-books, including *Sug. Powers*, vol. 2, p. 29, affirm the principle as quite settled, that a general power of appointment by will only will, when exercised, render the fund subject to the appointor's debts. This question must, therefore, be considered as settled law.

Secondly.—That the exclusion of some objects does not, for this purpose, interfere with the generality of the power, is also settled by the case of *Platt v. Routh* (e), and same case reported in the House of Lords, *Drake v. Attorney General* (f). Although the question arose upon the applicability of a statute, yet the decision is quite general, and shows that the power was to be considered as a general power of appointment.

Thirdly.—The parties claiming under a marriage settlement of the appointee cannot succeed against the creditors of the appointor: a purchaser of a chose in action takes it subject to all the equities which affected it in the hands of the assignor: *Jennings v. Bond* (g); *Small v. Parker* (h). Therefore, all that was conveyed by the settlement was the residue, after the appointor's debts were

1854.  
Rolls.  
EDIE  
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(a) 6 Madd. 264.

(c) 16 Beav. 1.

(e) 3 Beav. 257.

(g) 8 Ir. Eq. Rep. 755.

(b) 2 Vern. 319.

(d) 2 Drew. 165.

(f) 10 Cl. & Fin. 257.

(h) 16 Beav. 115.

1854.

*Rolls.*

EDIE

v.

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paid. A marriage settlement of this sort is fraudulent and void against creditors within the statute. This point also is not made or taken by the notice of appeal.

*May 21.*  
*Judgment.*

**THE MASTER OF THE ROLLS.**

In this case a motion has been made by way of appeal from an order of J. J. Murphy, Esq., the Master in this matter, bearing date the 30th of January 1854, that the said order, so far as it declares that the one-third of the sum of £8000 late Irish currency, in the petition mentioned, appointed by the will of Eleanor Chambers, deceased, constituted assets of the said Eleanor Chambers, and ought to be applied in payment of her just debts, may be varied, by declaring that the said one-third of said sum of £8000 did not constitute assets of the said Eleanor Chambers, available for the payment of her debts. The rest of the relief, prayed for by the notice, is consequential. The petitioner is a creditor of the late Eleanor Chambers, and this petition was filed for the administration of her assets.

The facts of the case are as follow :—Isaac Todd, since deceased, by his last will and testament, bearing date the 10th of June 1815, bequeathed to trustees the sum of £8000, late currency, in trust for the use and benefit of his daughter Eleanor, for her separate use for life; and that at the decease of his said daughter, two third parts of said sum of £8000 should be and remain for the use and benefit of the child and children of the said Eleanor, if any she should have, and the remaining one-third thereof she should be at liberty to dispose of by her last will and testament; and failing such disposition, that the said remaining one-third part should go to the use and benefit of her said child and children in equal proportions.

The codicil of the will of Isaac Todd contained a proviso that the said power given to Eleanor Chambers, to dispose of one-third of said sum of £8000, should not be exercised in favour of a person of the name of Bateman, who, it appears, had in some way offended the testator.

Isaac Todd died in the year 1819, leaving his daughter Eleanor him surviving. The said Eleanor married, in the year 1823, John

Chambers, since deceased, and a settlement was executed on her marriage, and by that settlement she, in my opinion, bound herself not to execute the power except under certain restrictions (a).

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Rolls.  
EDIE  
v.

However, as the Lord Chancellor has decided otherwise in the case of *Stuart v. Kennedy* (b), and has held that the provisions in that deed in no way affected the exercise of the power given to the said Eleanor Chambers by the will of Isaac Todd, it is unnecessary, as that decision is binding on this Court, that I should refer to the provisions of the said settlement.

BABINGTON.  
Judgment.

Eleanor Chambers died in the month of December 1846, having previously made her last will and testament; and she thereby, in virtue of the power and authority given her by the will of her father, the said Isaac Todd, and of all other powers and authorities enabling her in that behalf, devised and bequeathed the one-third part of the said sum of £8000 to trustees, in trust to pay two legacies of £150 each, to persons therein named; and after payment thereof, then as to the residue of said said one-third, in trust to pay the interest to her daughter Elizabeth, and after her decease to pay the principal to her issue, if any; and she thereby also appointed said daughter Elizabeth her residuary legatee.

The said Elizabeth Chambers married James Stuart, Esq., in the month of March 1850, and a settlement was executed on her marriage, by which it is said that her portion of the one-third of the £8000, bequeathed and appointed to her by her mother's will, was settled; but that settlement was not proved or relied on before the Master, nor was any notice given of using it on this motion, and the question which has been raised upon it does not properly arise upon this appeal.

Two questions have been argued. First, it has been contended by the Counsel for the respondents, that although where there is a general power to appoint a fund by deed or will (so that the donee of the power can in his lifetime make the property absolutely his own), and if he execute the power by will, the fund appointed will be assets of the donee of the power, yet if the power is only

(a) See *Ex parte Chambers*, 11 Ir. Eq. Rep. 523.

(b) 3 Ir. Jur. 305.

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Judgment.

to appoint by will, the principle is inapplicable, and that although the power is exercised, the fund appointed is not assets. It appears to me that there is no foundation for the argument.

In the case of *Jenning v. Andrews (a)*, Sir John Leach said, "Where there is a general power of appointment by will, and an appointment is made, the appointee is a trustee for creditors; but it is not for creditors at the time of the date of the will, but at the death of the testator."

It was said by Counsel that that was only a *dictum* of Sir John Leach, and that there was no authority in support of the *dictum*. In the case, however, of *Petre v. Petre (b)*, the power of appointment was only a power to appoint by will, and it was assumed that the sum appointed by the will of the donee of the power was assets, and liable to the payment of his debts. The Counsel who argued the case before Sir John Romilly did not suggest that there was any doubt on the point. In the case of *Williams v. Somers (c)*, the power was to appoint by will, and although the question was not argued by Counsel, the rule was laid down by Sir John Romilly, in the same way as it was laid down by Sir John Leach.

It was, however, suggested by Counsel for the respondents, that the question had been decided by Vice-Chancellor Kindersley, contrary to the *dictum* of Sir John Leach, and to the cases before Sir John Romilly; and the marginal note of *Vaughan v. Vanderstegen (d)* was relied on. As only four pages were reported in the part of Mr. *Drewry's Reports*, which was referred to, and as neither the argument of Counsel nor the judgment of the Court were contained in that part, I sent to London for the residue of the case, and I have obtained the third part of the second volume of Mr. *Drewry's Reports*, which I believe is now published; and it appears that, so far from the question having been decided in favour of the respondents, it has been decided the other way, and in accordance with the Master's decision, and the opinion which I expressed during the argument. The case was argued on exactly the same grounds upon which it has been argued here, and Vice-Chancellor

(a) 6 Mad. 264.

(b) 14 Beav. 197.

(c) 16 Beav. 1.

(d) 2 Drew. 165.

Kindersley. in giving judgment, said :—" The appointees resist this claim on several grounds ; first, they insist that the principle is not applicable, even in the case of a man, where (as in the present case) the power is only to be exercised by will, and not by deed. No authority whatever is adduced in support of this proposition. It is admitted that if the power authorises its being exercised by deed or will, and the donee exercises it by will, the principle will apply. Now, it is not the mere possession of the power, but the exercise of the power, which can ever give occasion to the application of the principle ; and if it will be applied at all, where the power is exercised by will, I do not see what difference it can make, whether the power did or did not authorise its exercise by deed as well as by will. In *Jenning v. Andrews (a)*, the very case was presented, of an appointment by will under a general power, which by the terms of its creation only authorise the donee to exercise it by will. It does not seem to have occurred to the Counsel for the appointees to argue the point now insisted upon ; the only question argued was whether, among the creditors of the appointor, whose debts were to be paid out of the appointed sum, creditors, who were such at the time of the bankruptcy of the appointor, should be included. Sir J. Leach, Vice-Chancellor, expressed himself in these terms :—" Where there is a general power of appointment by will, and an appointment is made, the appointee is a trustee for creditors ; but it is not for creditors at the time of the execution of the will, but at the death of the testator." This declaration of Sir J. Leach's opinion would be sufficient authority for me, even if I had any doubt on the point."

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Judgment.

The principle of the rule is not, in my opinion, as contended for by the respondent's Counsel, that the donee of the power, where the power is to appoint by deed or will, can in his lifetime make the property absolutely his own. The principle appears to be that where persons take as volunteers, and by the bounty of the donee of the power, the fund appointed is assets of the donee. It would be anomalous if a person could claim under a will as the legatee of the donee of the power, to the exclusion of his creditor.

(a) 6 Mad. 264.

1854.  
*Rolls.*  
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 v.  
 BABINGTON.  
 Judgment.

It has been contended, secondly, that as Eleanor Chambers was precluded by the codicil to the will of Isaac Todd, from exercising her power of appointment in favour of Mr. Bateman, the power was not a general power, and that in case of a limited power the rule does not apply. The answer to that objection is that the power is to be considered a general power, notwithstanding the restriction in the codicil to Isaac Todd's will. The observations of Lord Langdale in *Platt v. Routh* (a), and of Lord Abinger in the same case (b), in which I entirely concur, are, in my opinion, a complete answer to the objection which has been raised. The decision in 3 *Beav.* was affirmed by the House of Lords. The case in the House of Lords is reported under the name of *The Attorney General v. Drake* (c).

The next question raised is that the point was in effect decided by the Lord Chancellor, in the case of *Stuart v. Kennedy*, having regard to the answer of Mr. Babington in that cause. I am clearly of opinion that it was not decided by the Lord Chancellor in that case, and that objection to the Master's order also fails.

I never recollect an appeal brought forward in this Court so totally groundless, both on principle and authority, and I shall therefore refuse the motion with costs.

Mr. *Francis Fitzgerald*, however, has raised a question which was not brought under the consideration of the Master, viz., that the portion of the one-third of the £8000, which was appointed to Eliza Chambers by her mother's will, was settled on her marriage with James Stuart, Esq., by settlement bearing date the 17th of March 1850, and that as the parties who claim under that settlement are purchasers for valuable consideration, they are to be preferred to the petitioner, and the other general creditors, if any, of Eleanor Chambers. Mr. *Fitzgerald* referred on this point to the case of *George v. Milbanke* (d).

The answer to that objection is, that it was not raised before the Master, and has not been raised by the notice of motion, and that

(a) 3 *Beav.* 230.

(b) 11 *Mees. & W.* 789.

(c) 10 *CL. & Fin.* 257.

(d) 9 *Ves.* 190.

the settlement on which the question arises was not proved before the Master, nor was it in any manner verified before me.

The objection took the petitioner's Counsel entirely by surprise, and it is not reasonable that questions of this nature should be raised for the first time on the appeal. I do not wish, however, to shut out the consideration of the question; and as there are cases in which exhibits have been permitted to be proved on an appeal, and the question arising on such exhibits argued, I shall refuse the present motion, with costs, but without prejudice to such of the respondents as claim under the settlement of 1850, serving notice of a motion for the purpose of proving the settlement, and raising the question which *Mr. Fitzgerald* contends arises thereunder.

1854.

*Rolls.*

EDIE

v.

BABINGTON.

*Judgment.*

1853.

Chancery.

Sir E. M'DONNELL and ROBERT RUN-  
DAL GUINNESS, . . . . . *Petitioners ;*  
THE GRAND CANAL COMPANY, . . . . . *Respondents.*

Sir E. M'DONNELL and J. PENNE-  
FATHER, Esq., . . . . . *Petitioners ;*  
THE MIDLAND GREAT WESTERN  
RAILWAY COMPANY, . . . . . *Respondents.*

(Chancery.)

March 18, 19.

The M. G. W. Railway Company had purchased, under the sanction of an Act of Parliament, the Royal Canal and all the property belonging to it; and they afterwards entered into a contract with the Grand Canal Company to purchase the Grand Canal and its property, and that until an Act of Parliament could be obtained for the purpose, a lease should be made by the Grand Canal Company to the M. G. W. Railway Company, under the provisions of the Canal Carriers' Act, 8 & 9 Vic., c. 42. The agreement was adopted at a meeting of the Grand Canal Company, and a draft lease approved of, which comprised not only the tolls and duties of the canal, but also all the real estate and personal property belonging to the Grand Canal Company. *Held*, on a petition filed by two shareholders of the Grand Canal Company to restrain the Company from executing the lease, that although the lease *per se* was within the Canal Carriers' Act, as it was part of the arrangement for the transfer of the canal and its property to the Railway Company, it was illegal; and the Court granted an injunction to prevent the execution of it.

The Royal Canal and the Grand Canal run parallel to each other for a short distance, and then diverge and fall into the River Shannon, at some distance from each other.

*Held*, that as they communicate with each other by water, they are within the Canal Carriers' Act, so as to enable the Grand Canal Company, under that Act, to make a lease of their tolls and duties to the M. G. W. Railway Company, who had become proprietors of the Royal Canal.

The Court will not consider the *quantum* of interest of shareholders in a Company who seek for an injunction, nor whether their interest would entitle them to vote at a meeting of the Company; but where the petitioners had purchased two shares for a nominal consideration, after the agreement which they complained of had been entered into, and with full notice of it, and for the purpose of preventing its completion, the Court refused an injunction.

their directors, officers and agents might be restrained by injunction from putting the seal of the Company, or otherwise causing, or executing, or permitting the execution of the engrossment of the draft lease read and referred to at the meeting of the Company held on the 19th of February 1853, or of any draft deed to be settled, pursuant to the resolutions passed at the said meeting, or any deed, lease or contract for a lease comprising the terms contained in said report of the directors, or to the like effect; and consequential relief.

The material statements in the petition were the following:—  
The Grand Canal Company were incorporated by an Act of the 11 & 12 G. 3; and by another Act passed in 1848, the Companies Clauses Consolidation Act was incorporated therewith. By the 8 & 9 Vic., c. 42, entitled an Act to enable Canal Companies to become carriers of goods upon their canals, section 8, it was enacted that it should be lawful for any Canal or Navigation Company, from time to time, by lease, to take effect in possession within six months from the letting thereof, to let the tolls and duties, or any part thereof, upon the whole or any part of any such canal or navigation, to any other Canal or Navigation Company (and which lease such other Canal or Navigation Company was thereby authorised to accept and enter into) for any period not exceeding twenty-one years from the commencement of any such lease; provided always that no such letting should take place unless public notice of the intention to let such tolls, or the part thereof intended to be let, should have been given by the Company proposing to let the same, by advertisement, at least fourteen days prior to the meeting of the directors or managers at which it should be intended to let such tolls.

The Grand Canal Company were entitled to the rents of certain lands and hereditaments belonging to them, and to certain rents or rates payable to them for supplying the inhabitants of that part of Dublin lying to the south of the River Liffey with water; they were also possessed of steam tug-boats, barges, &c., and other property, for the purpose of carrying on the trade of the canal.

The Grand Canal commences at the south side of Dublin, where

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GRAND  
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COMPANY.  
—  
*Statement.*

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**M'DONNELL**  
*v.*  
**GRAND**  
**CANAL**  
**COMPANY.**  


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*Statement.*

it unites with the Liffey, and proceeds westward to the River Shannon, which it joins about fifteen miles below the town of Athlone.

The Royal Canal Company are proprietors of the Royal Canal, which commences on the north side of Dublin, where it unites with the Liffey, and proceeds westward to the Shannon, which it unites with, twenty-seven miles above Athlone. The two canals, after leaving Dublin, run parallel to each other for a short distance, after which they continually diverge until they reach the Shannon, at a distance of forty-two miles from each other.

The Midland Great Western Railway of Ireland Company was incorporated by an Act of the 7 & 8 Vic., and by that Act it was enacted that should it be lawful for the said Railway Company to contract with the Royal Canal Company for the purchase of the Royal Canal and its property. The Railway Company accordingly purchased the Royal Canal, and entered into possession of all the property belonging to it. In December 1852, a treaty was entered into between the two Companies for the purchase of the Grand Canal, and the following agreements were accordingly proposed to and adopted by the Grand Canal Company.

"Messrs. John Ennis, James Perry, Joseph Boyse, Joseph Cowper and James Sterling, on the part of the Midland Great Western Railway of Ireland Company, will recommend to the proprietors of that Company the proposal made by the directors of the Grand Canal Company to accept, in £50 and £25 shares, stock equal to one £50 share, £47. 10s. paid up thereon, of the Railway Company, for each £100 of the consolidated stock of the Grand Canal Company; the Grand Canal Company giving over to the Railway Company the entire of the property of all descriptions, including Government stock belonging or appertaining to the Grand Canal, and which the directors of that Company agree to recommend to their proprietors at a meeting to be called for that purpose. This agreement to take effect from and after the 30th of June, and under the authority of an Act of Parliament to be obtained for that purpose.—Dated this 22nd day of December 1852."

"W. DIGGES LATOUCHE."

“Resolved—That the above arrangement be deemed highly satisfactory, and is hereby confirmed; that the chairman and other members of the board who negotiated it be empowered to take all the necessary steps for having it carried into effect.”

6th January 1853.—Mr. Perry reported that, at the request of the directors of the Grand Canal Company, the former deputation from the Company, consisting of Messrs. Ennis, Boyse, Cowper, Sterling and himself, had this day a lengthened conference with the Grand Canal directors, when the following additional minute had been agreed to, viz. :—“It is desirable that the Midland Great Western Railway Company shall get immediate possession of the canal and its appurtenances. It is further agreed that pending the obtaining of the requisite Act of Parliament for legalising the transfer of the Grand Canal and its appurtenances, the Midland Great Western Railway Company agree to take a lease of the concern on terms equivalent to those stated in the annexed agreement, that is, which will produce to the proprietors of the Grand Canal Company a rent from the 1st of January instant, equal to the dividends which will be paid on the Midland Great Western shares, to be given for Canal stock, such lease to be for a term of three years, but to terminate on the passing of the Act.”

“W. DIGGES LATOUCHE, Chairman.”

“Resolved—That the above additional minute be confirmed.”

Advertisements were afterwards published, convening meetings of the Grand Canal Company (the proceedings at which are sufficiently stated by the LORD CHANCELLOR in his judgment) with a view to carry out the foregoing agreement; and ultimately, at a meeting of the 19th of February 1853, it was resolved that a lease should be made to the Midland Great Western Railway Company for three years, upon the terms specified in a draft deed submitted to the meeting by the directors of the Canal Company, which was not only a lease of the tolls and duties of the canal, but conveyed all the property of the Canal Company. On the 10th of February 1853, a meeting of the Railway Company had been held, at which it was resolved to adopt all the powers of the Canal Carriers' Act.

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*Chancery.*  
M'DONNELL  
v.  
GRAND  
CANAL  
COMPANY.  
—  
*Statement.*

1853.  
Chancery.  
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 v.  
 GRAND  
 CANAL  
 COMPANY.  
 —  
*Statement.*

The petition submitted that the proposed contract or lease was not a contract or lease within the meaning of the Canal Carriers' Act, but was for the purpose of enabling the Railway Company to obtain possession of the Grand Canal, and of the property thereof, and in furtherance of the said proposed scheme to transfer the said Canal and property to the said Railway Company, and not for the purpose of facilitating or accommodating any traffic passing along the Grand and Royal Canals; and that immediately upon the execution of the said contract or lease, the said Grand Canal Company threatened and intended to give up, and the said Railway Company to take possession of, the Grand Canal, and of the steam tug-boats, &c., and other property of the Canal Company, and the rents of the lands belonging to them, and the water-rates payable by the inhabitants of the city of Dublin, unless prevented by an injunction. That the proposed contract for a lease was not a *bona fide* exercise of the power of leasing granted to Canal Companies by the Canal Carriers' Act; and that it was intended by the said Companies, partially and without the sanction of the Legislature, to carry out the aforesaid contract for the transfer of the Grand Canal, and the property belonging thereto, to the said Railway Company; and that such contract was wholly beyond the present powers of the said Companies, and could not be effectuated without the consent of Parliament.

A petition was also filed by Sir Edward M'Donnell and John Pennefather, proprietors of two shares in the Midland Great Western Railway Company, to restrain that Company from carrying out the said agreement.

On the 26th of February 1853, applications were made to the Master of the Rolls for injunctions in both matters. His Honor pronounced the following order in the matter of *M'Donnell v. The Grand Canal Company* :—

"It is ordered," &c., "that an injunction do issue in this matter, to restrain the Grand Canal Company and their directors, officers and agents, from putting the seal of the said Company, or otherwise executing or causing the execution of the engrossment of the draft deed or lease of the Grand Canal, or of the tolls, rates and duties thereof, by the said Grand Canal Company to the Midland Great Western

Railway of Ireland Company, read or referred to at the meeting of the said Canal Company, in the petition mentioned, held on the 19th day of February 1853; or of any other deed to be settled pursuant to the resolution passed at said meeting, or any deed, lease or contract for a lease, comprising the terms contained in the report of the directors of the said Grand Canal Company, in the petition mentioned, or to the like effect; and also to restrain the said Grand Canal Company and their directors,\* officers, agents and servants, from delivering possession of the said Grand Canal, or the steam-tugs boats, barges, vessels, horses, waggons, carts, warehouses, stores and other the property of the said Grand Canal Company, or any of them, or any part thereof respectively, to the said Railway Company; and from giving to or permitting the said Railway Company to receive or take the rents and profits of the lands, tenements and hereditaments of the said Grand Canal Company, or the water-rents or rates payable to the said Grand Canal Company by the inhabitants of the city of Dublin and its neighbourhood, or any part thereof respectively, as therein mentioned, or in any manner from acting upon the agreement for a lease in the petition mentioned; and also to restrain the said Railway Company, their directors, officers, agents and servants, from taking possession of the said Grand Canal, steam tug-boats, vessels, barges, horses, waggons, carts, warehouses, stores and other property of the said Grand Canal Company, or any part thereof respectively; and from receiving or taking the said rents, and water-rents or rates, or any part thereof, until the said respondents, the Grand Canal Company and the Midland Great Western Railway of Ireland Company, should have respectively filed answering affidavits to the cause petition, and further order.

A similar order was pronounced in this case against the Railway Company.

On the 2nd of March, an affidavit was made by William Digges La Touche, Esq., the chairman of the directors of the Grand Canal Company. The affidavit denied the intention of the Company to make any lease or agreement beyond what they were legally empowered to make, and stated that their instructions to their Counsel were to prepare a lease, or deed or agreement, in strict conformity

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*Statement.*

with their powers under the Acts, to which they were determined faithfully to adhere. That the agreement was intended to be merely a temporary arrangement, until an Act of Parliament could be obtained. That the petitioner Sir Edward M'Donnell was chairman, and Mr. Guinness one of the directors of the Great Southern and Western Railway Company, with whom there had been a treaty in 1852 for the purchase of the Grand Canal, which had been broken off; and that the object of the petitioners was to throw such obstacles and impediments to the carrying out of the arrangements between the Grand Canal Company and the Midland Great Western Railway Company as might induce the same to be broken off, in order that the negociation with the Great Southern and Western Railway Company might be renewed, and the Canal become, at their own estimation, the property of the Great Southern and Western Railway Company; and that the petitioners became shareholders of the Grand Canal Company, on the 31st of December 1852, when they were both aware of the agreement in question; and that the amount of the Canal stock which they held did not qualify them to vote at a meeting of the proprietors of the Grand Canal Company.

An affidavit was also filed on the 2nd of March, in the case of *M'Donnell v. The Midland Great Western Railway Company*, which, in addition to the matter relied on in the other case, stated that the petitioners had each, on the 3rd of February, purchased, for a nominal consideration, a transfer of one £50 share, with £47. 10s. paid up, from a Mr. Williams, who was not a party to the suit, and that they had no other shares.

The respondents in both matters appealed from the orders pronounced by the Master of the Rolls.

*Argument.* The *Attorney-General*, Mr. Martley, Mr. B. C. Lloyd, Mr. F. A. Fitzgerald and Mr. H. Barry, for the petitioners in both matters.

Serjeant Christian, Mr. Hughes and Mr. J. A. Phillips, for the Midland Great Western Railway Company.

Mr. *Hans Hamilton* and Mr. *Fitzgibbon*, for the Grand Canal Company.

The points relied on in support of the order were, that the lease was not a *bona fide* one, nor within the Canal Carriers' Act, which was passed in order to enable Canal Companies to carry on the traffic continuously, and applied only to cases where canals or railways communicate with each other, and did not authorise the absorption of one Canal Company in the other. That the lease was a colourable proceeding, and a contrivance to carry out an illegal agreement, and to apply the funds of the Company to a purpose which the Acts did not authorise, and was contrary to public policy, as tending to create a monopoly; and that any party who had an interest in either Company, no matter how small, might come forward and ask for the interference of the Court: *Beman v. Rufford* (a); *Colman v. The Eastern Counties Railway Company* (b); *Bagshawe v. The Eastern Union Railway Company* (c); *Winch v. The Birkenhead, Lancashire and Cheshire Railway Company* (d); *Simpson v. Dennor* (e); *The Great Northern Railway Company v. The Eastern Counties Railway Company* (f).

In support of the appeal, it was contended that the injunction should be discharged, on account of the character of the petitioners, who were not *bona fide* shareholders, but had purchased a right of suit, the indirect purpose and object of the suit, and their acquiescence in the proceedings; that there was no illegal intention on the part of either Company, their object being to apply for an Act to the Legislature to sanction the proceeding. They had not advanced a step beyond what the law allowed. There was nothing illegal in applying the funds to procure an Act of Parliament: *Rundell v. Murray* (g); *Saunders v. Smith* (h); *Williams v. Lord Jersey* (i); *Ware v. Grand Junction Water-*

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Argument.

(a) 1 Sim., N. S., 550.

(b) 10 Bea. 1.

(c) 6 Rail. Cas. 152.

(d) 16 Jur. 1035.

(e) 16 Jur. 828.

(f) 9 Hare, 306.

(g) Jac. 311.

(h) 3 M. & Cr. 730.

(i) Cr. & Ph. 97.

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*works Company (a); Graham v. Birkenhead, Lancashire and Cheshire Railway Company (b); The Great Western Railway Company v. Rushout (c); Natusch v. Irving (d); Shrewsbury and Birmingham Railway Company v. The London and North Western Railway Company (e).*

**The LORD CHANCELLOR.**

*Judgment.*

There are two orders now before me, both tending to and effecting the same object; but the cases in which they were made are differently circumstanced, and require, in some respects, a different consideration. The substantial effect of both orders is, to prohibit the Grand Canal Company from carrying out any transfer or demise of their canal, and the Midland Railway Company from taking a transfer of that property. In truth it is a matter of indifference on which of the orders the decision of the Court is pronounced, because either order, if undisturbed, accomplishes the proposed object; and, therefore, although the case was discussed on both the petitions by Counsel concerned for both the respective parties, there is in fact but one consideration for the Court, of a substantial character, as regards the general nature of the proceeding; and that is, in the first place, whether the purpose designed to be carried out by these respective Companies is one which they can legitimately carry out, without the intervention of a statutory power enabling them so to act?

I confess I was struck with one consideration addressed to me, as regards the question of public policy in this matter; I mean public policy as regards the general benefit of the country; because I do not think that these cases, or any cases, can or ought to be determined by a general consideration of that kind. I am not prepared to say that it is a doctrine of this Court that it is to consider the effect of any particular proceeding in creating a monopoly in favour of any party. Considerations of that kind have from time to time prevailed more or less in the public mind. At one period monopolies have been favoured, at another they have been repressed

(a) 2 Russ. & M. 70.

(b) 2 M.N. & Gord. 146.

(c) 5 De Gex & Sim. 290.

(d) 2 P. Coop. 358.

(e) 2 M.N. & Gord. 354.

with great severity, and statutes have been enacted against them. Public opinion has fluctuated with regard to monopoly and protection, and it is a subject on which it would not be very safe to rest the decision of a Court of Justice. The public policy on which a Court is to act should be clear and well defined; and on this question I may adopt the language of Chief Justice Best, in the case of *Richardson v. Mellish* (a); he says:—"We have heard much of this being in contravention of public policy, and that on that ground the action cannot be supported. I am not much disposed to yield to arguments of public policy. I think the Courts of Westminster Hall (speaking with deference, as an humble individual like myself ought to speak, of the judgments of those who have gone before me) have gone much further than they were warranted in going on questions of policy; they have taken on themselves sometimes to decide doubtful questions of policy; and they are always in danger of so doing, because Courts of Law look only to the particular case, and have not the means of bringing before them all the considerations which ought to enter into the judgment of those who decide on questions of policy. I therefore say, it is not a doubtful matter of policy that should decide this, or that should prevent the party from recovering. If once you bring it to this, the plaintiff is entitled to recover; and let this doubtful question of policy be settled by that high tribunal, viz., the Legislature, which has the means of bringing before it all the considerations that bear on the question, and can settle it on its true and broad principle. I admit that if it be clearly put upon the contravention of public policy, the plaintiff cannot succeed; but it must be unquestionable—there must be no doubt. Looking to all the facts of this case, I can see no unquestioned principle of policy that stands in the way of the plaintiff to hinder him recovering in this action."

In *Davis v. The Bank of England* (b), the same learned Judge says:—"We ought not to trust ourselves with so dangerous a power as that of acting judicially on disputable policy." Now, so far from having any clear ground of public policy against a

(a) 2 Bing. 242.

(b) 2 Bing. 410.

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 ———  
*Judgment.*

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*Chancery.*  
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*Judgment.*

monopoly in the present case, public policy would appear to be the other way; for the first Act in relation to this particular Company is to give them a monopoly in relation to one canal, at all events; and we have not only the opinion of the Legislature that this was not a violation of public policy, but we have also the decision of a Court of Justice to the same effect. In the case of *The Midland Great Western Railway Company v. Gordon (a)*, "the defendant subscribed to an undertaking for a railway from Dublin to Mullingar and Athlone, with a branch to Longford, and signed the subscribers' agreement, by which it was declared that the directors should have power to complete the railway and branch, and all such other works as therein mentioned; and for that purpose to select and take up, and from time to time to alter and vary the sites or spots at or over which the said intended railway or branches thereof respectively should commence, extend or terminate, and also the intermediate course or courses thereof. That the directors should make such application to Parliament for carrying into operation all or any of the purposes aforesaid, or any portion thereof, as the directors should think proper. The directors applied to Parliament, and obtained an Act for a Railway from Dublin to Mullingar and Longford, which, among other things, empowered the Company to purchase a canal, and bound them to maintain it for the purposes of navigation. The Court held that the directors were authorised in applying for and accepting such an Act."

So that there is, in the case of this very Company, the decision of the Legislature and of a Court of Justice that there is nothing contrary to law or good policy in obtaining such an Act of Parliament as this.

Again, turning to the Canal Carriers' Act, I find enactments in it which have manifestly the effect of creating or establishing monopolies, not only by the junction of two lines into one, but of fifty lines into one. Therefore I do not think that it would be safe for the Court to act on any consideration of public policy in this case; the bearing of the facts of the case is against it. But there is

(a) 5 Railw. Cas. 76.

a species of public policy which controls cases like this; and it is that simple policy which declares that no body of directors or proprietors of a Company, constituted like this, shall depart from the special powers given by the Act of Parliament constituting them, or divert the funds from the purposes designed by it. That is a clear and plain description of public policy, and many cases have been decided upon it. There is no occasion to refer to more than one or two of them. They are, I might almost say, in the same language, and it would be difficult to find in any one case stronger language than in another. They all appear to me to proceed on the same principle.

In *Colman v. Eastern Counties Railway Company* (a), Lord Langdale says:—"I am clearly of opinion, that the powers which are given by an Act of Parliament like that now in question extend no further than is expressly stated in the Act, or is necessarily and properly required for carrying into effect the undertaking or work which the Act has expressly sanctioned." Lord Langdale in that case granted an injunction against doing an act which, *per se*, was an important and useful act, and would have been of great and paramount advantage.

In *Beman v. Rufford* (b), the same doctrine is laid down by Lord Cranworth, in this strong language:—"I am clearly of opinion, both on principle and authority, that it is the province of this Court to prevent the contract from being carried into effect; because, on the principle that has been so often laid down, this Court will not tolerate that parties, having the enormous powers which railway companies obtain, should apply one farthing of their funds in a way which differs in the slightest degree from that in which the Legislature has provided that they should be applied." Again, he says:—"The bill, however, is filed by certain shareholders in the Oxford, Worcester and Wolverhampton Railway Company, and the principle on which they are entitled to file it on behalf of themselves and all the other shareholders is, that this Court will not allow one of them to say that they are not interested in preventing the law of their Company from being violated. It will not allow one of them to spe-

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*Judgment.*

(a) *Ubi supra.*

(b) 1 Sim. N. S. 565.

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*Judgment.*

culate as to whether it will be more advantageous to do something which the Act of Parliament does not authorise to be done; and therefore it is, that a very small number, or indeed one, of the shareholders, may file a bill on behalf of the whole body, although, at a meeting of the Company, a large majority of the other shareholders may have sanctioned that course of proceeding which the bill complains of. The shareholders so filing this bill say, that their Company, together with the directors of it, have entered into the contract with the North Western and Midland Companies, to make a railway different from that which was contemplated by the Act of Parliament, and so to apply the funds, which the plaintiffs say are their funds, in a mode in which they were never authorised to be applied; and therefore the plaintiffs seek to restrain them."

The other cases which have been referred to, and to which I need not more particularly allude, in 9 *Hare*, p. 306, *Munt v. The Shrewsbury and Chester Railway Co. (a)*, *Logan v. The Earl of Courtown (b)*, all proceed on the same principle, which is a plain principle of public policy. The Court will therefore, no doubt, interfere in a fit and proper case, to prevent the diversion of the funds of the Company from the purpose for which it was constituted, and to prevent the exercise of the powers of the Company to effect an object which is not within the Act of Parliament which created them. There is a limit, however, and but one limit I apprehend, to that interference of this Court, and that is, that it will not, as it is now settled by the case of *Heathcote v. North Staffordshire Railway Company (c)*, prevent parties from making an application to Parliament for any purpose which they may think fit out of their Act of Parliament, if it be a legal purpose. That is, I believe, I may say the only limit recognised by the Court, and the only restriction placed on its interference to prevent a deviation by the Company from the line of railroad or canal which it was constituted to carry out. It will prevent the application of the funds to the purpose of soliciting an Act of Parliament, though it will not restrain the parties from applying for the Act of Parliament.

The general principles applicable to a case like this are therefore

(a) 13 Beav. 1.

(b) 13 Beav. 22.

(c) 2 M. & G. 100.

well understood; and the sole question is, does the case now before the Court fall within those principles?

As I have already said, I have two cases before me. In the one case, certain shareholders in the Midland Great Western Railway Company file a petition on behalf of all the shareholders in the Company, as well as themselves, against the directors of the Company, to restrain them from carrying out this proposed agreement. In the other case, certain shareholders of the Grand Canal Company seek to restrain that Company from carrying out the same agreement; and no doubt both petitions, based on the authorities which I have cited, suppose there is no other objection to them, are well founded and sustainable in law. The contract is one which cannot be carried out without the sanction of the Legislature, either by one Company or the other—I mean the contract for the transfer of the canal to the Railway Company. That may be, for any thing I know, a desirable and proper subject for the consideration of the Legislature; and, for any thing I know, Parliament may accede to the proposition. But it is not disputed, and indeed the agreement on the face of it assumes the fact, that it cannot be carried out except by the intervention of the Legislature; and the Court is not called on to interfere against any thing done in pursuance of that contract, standing by itself, but against something which is superadded to it, and which, it is contended on behalf of the petitioners, is so intimately connected with it, as to be inseparable from it; and that is another contract for a different and a more limited object. It being found that the general transfer could not be carried out without an Act of Parliament, and the terms of the agreement plainly show that it could not—nothing but the Legislature could sanction it—it was considered important by the parties who were under the belief that Parliament would accede to the application, which could not be immediately granted, consistently with the parliamentary forms, that a distinct stipulation should be entered into in the meantime, and pending the negotiation for an Act of Parliament; the substantial object to be attained by that stipulation being, the immediate transfer and conveyance of the traffic of the canal to the Railway Company, upon terms which should produce, by way of rent to the Canal Company, that which would be equivalent to the dividends

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*Judgment.*

of the purchase-money, in case the whole arrangement was carried out. The terms of that proposed arrangement have been very much discussed in the course of the argument of this case. They rest, however, on very few documents, and appear to me to be very free from doubt, I mean, in the first instance, before the parties came to cast about to see what it was that by law they were enabled to do. I have no doubt, upon the original minutes of the 22nd of December 1852, that the parties intended an absolute demise of the canal, and all its rights and properties, the stock, and various properties of that sort, the rates payable, and in fact every thing which the Canal Company possessed, to the Railway Company. The terms of the instrument can scarcely be called ambiguous, although doubt was cast on them in the course of the discussion. The first proposal is in these terms:—"The chairman reported, that having received a letter from the Great Southern and Western Railway Company, stating that they were not warranted in agreeing to the proposal referred to, several of the directors have considered the matter, and have determined that the Company should become purchasers of the canal. Accordingly, an interview had been sought with this Company, with the additional understanding that this Company was to bear the expense of the Act of Parliament. Messrs. Boyse and Perry will recommend to the proprietors of the Company the proposal to accept in £50 shares, or two £25 shares, equal to a £50 share, £47. 10s. 0d. being paid up thereon, stock of the Midland Great Western Railway of Ireland Company; the Grand Canal Company making over and transferring to the Railway Company the entire of the property of all descriptions, including Government stock belonging and appertaining to the Grand Canal Company; such transfer to take effect on the 30th of June next, under the authority of an Act of Parliament to be obtained for that purpose." Thereupon a resolution was passed at the meeting, in these terms:—"Resolved, that the meeting approve of the proposed purchase, by a transfer to this Company of the Grand Canal, with all works, lands and property thereto belonging; and that the directors of this Company shall be and are hereby authorised to take all such steps as may be necessary for legally and effectually completing such purchase or transfer, whether by procuring

an Act of Parliament conferring powers in that behalf, or by any other legal means, and that the said directors be also, and they are, hereby authorised to take the proper steps for the adoption by this Company of all the powers to make contracts, and to make and accept leases mentioned in, and conferred by, an Act of Parliament, passed in the 8th and 9th years of the reign of her present Majesty Queen Victoria—an Act to enable Canal Companies to become the carriers of goods upon their canals.” Is there any doubt, that what the meeting appears to adopt, in form, is the proposition for the transfer of the lands and all the property of the canal, to be legalised by an Act of Parliament? Nothing is said distinctly with regard to the lease; but the resolution merely goes to the determination to acquire the powers to be conferred by Act of Parliament, manifestly with the view of using those powers for some purpose connected with this arrangement.

On the 10th of February 1853, a notice was published in the Dublin Gazette, calling an extraordinary meeting of the Company, in these terms:—“Midland Great Western Railway of Ireland Company.—Notice is hereby given by the directors to the shareholders of this Company, that an extraordinary general meeting of the shareholders will be held on Thursday the 10th of February next, at the hour of one o’clock in the afternoon, at the Company’s offices at the Broadstone Terminus in the city of Dublin, for the purpose of determining whether or not the Company will adopt the powers and provisions granted by the Act passed in a session of Parliament held in the 8th & 9th years of the reign of her present Majesty, entitled ‘An Act to enable Canal Companies to become carriers of goods upon their canals,’ in respect of the powers of making contracts with other Companies, as specified in and conferred by the 7th section of said Act; and also in respect of the powers of making and accepting leases of tolls and duties specified in and conferred by the 8th section of said Act, and for the purpose of adopting all or any of the said powers in respect of the Grand Canal and the appurtenances belonging thereto, and accepting a lease thereof or otherwise, as may be determined by the legal and proper majority of votes of the shareholders, who

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*Judgment.*

shall be in said meeting assembled, either in person or by proxy ; and the business of said meeting shall be to determine on the adoption or non-adoption of the said powers, or such of them as may be adopted by such majority of votes as aforesaid.—Dated this 21st day of January 1853.—By order, John Ennis, Chairman.  
H. Beausire, Secretary—Broadstone Terminus.”

In the same month of February 1853, another advertisement was published :—“Grand Canal Company. Special Extraordinary meeting of the Company.—Notice is hereby given that an extraordinary meeting of the proprietors of this Company will be held at their house, No. 50 William-street Dublin, on Saturday the 19th day of February instant, at twelve o'clock at noon, for the purpose of determining whether or not this Company will adopt all or any and which of the powers and provisions granted by the Act passed in the Session of Parliament held in the 8 & 9 *Vis.*, c. 42, entitled ‘An Act to enable Canal Companies to become carriers of goods upon their canals,’ in addition to those powers already adopted by the said Company, and especially the powers of making contracts and agreements with other Companies, as specified in and conferred by the 7th section of the said Act ; and also all or any and which of the other powers and provisions specified in and conferred by the said Act ; and in particular, whether or not, in order to carry into effect the resolution adopted by the Company at their extraordinary meeting held on Saturday the 8th of January last, for the transferring of the Grand Canal and of all property held by the Company in connection therewith to the Midland Great Western Railway of Ireland Company, the Grand Canal Company will at such meeting determine to make and execute, under the seal of the Company, and in conformity with the provisions of the said Act, a contract or agreement with the said Midland Great Western Railway of Ireland Company, respecting the traffic by the said Midland Great Western Railway of Ireland Company on the said Grand Canal, and the passage of the boats, barges and other vessels thereon, and such other matters and things as shall be then adopted, pursuant to the said Act ; and also to make and execute a lease of the tolls and duties of the said Grand Canal, and of its several

branches, for a term not exceeding three years, or pending the obtaining an Act of Parliament for legalising the said transfer of said Canal, at a rent or rents conformable to the terms of the resolution passed at the meeting of the Company so held on the 8th day of January last, and the terms and conditions to be then submitted to the said meeting; and also for the purpose of adopting such other of the powers and provisions of the said Act as have not hitherto been adopted by the said Grand Canal Company, and which may be necessary for the purposes aforesaid, or any of them, or may tend to facilitate the carrying the same into effect.—Dated this 1st day of February 1853.—By order, John M'Mullen, Secretary."

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Then comes the meeting of the 10th of February 1853, and the 19th of February 1853, the latter of which is that particularly mentioned in the injunction, and particularly brought under the notice of the Court. The resolution passed at the meeting of the 10th of February was this:—"Resolved that this Company do adopt all the powers of making and entering into contracts and agreements with other Canal and Navigation Companies, or the Commissioners or undertakers thereof, respectively conferred by an Act of Parliament, held in the 8th and 9th years of the reign of her Majesty, entitled 'An Act to enable Canal Companies to become carriers of goods upon their canals;' and also do adopt the powers granted and conferred by the said Act, of granting and accepting leases of the tolls and duties or any part thereof, upon the whole or any part of any canal or navigation, for any period not exceeding twenty-one years."

On the 19th of February 1853, a meeting of the proprietors of the Grand Canal Company was held, at which the following resolution was passed:—"Resolved, that this Company have determined to adopt, and accordingly do hereby adopt, all and every the powers and provisions granted by the Act of Parliament, entitled 'An Act to enable Canal Companies to become carriers of goods upon their canals,' passed in the 8th and 9th years of the reign of Queen Victoria, c. 42; and especially the power to make contracts and agreements to make and execute leases as thereby authorised; and that the proposal for a contract, agreement and lease, made by the

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Midland Great Western Railway Company of Ireland to the said Grand Canal Company for a term of three years only (subject to be sooner determined in case an Act of Parliament shall so provide), be and is hereby accordingly accepted by said Grand Canal Company, upon the terms, as to rents, covenants, conditions, provisoes and reservations, set forth and specified in a certain draft of a deed now submitted to the meeting of the directors of the Grand Canal Company, with full power and authority to the said directors to arrange, vary, modify and settle the terms and form of the said draft, as they may judge most expedient and beneficial to the said Grand Canal Company; and with full power and authority to the said directors to execute any deed carrying such contract, agreement and lease into effect, when finally settled and arranged by them; and that the meeting adopts all the powers and provisions of the said Act, required for the purposes aforesaid, or any of them, and hereby authorises the said Board of Directors to exercise the same as they may think fit."

Now the last resolution which I have read is that against which I may say this petition is directed. That resolution accepts the proposal for a contract, agreement and lease, made by the Midland Great Western Railway Company, and it deposes and authorises the directors to carry the same into effect, upon the terms, as to rent, covenants, &c., set forth and specified in a certain draft deed. When the case was before the Master of the Rolls, it appears that the identity of the draft produced was not accurately ascertained, with this exception, that a draft was handed in by the Counsel for the Midland Great Western Railway Company, was read to the Court, and was considered by the Court to have been the draft submitted at that meeting. That draft I have also before me, and it certainly does amount to a complete demise of every thing belonging to the Canal Company, in the largest terms; and, no doubt, supposing it to have been legal, that would have been the lease which, I apprehend, Counsel would have drawn under the agreement, if it had been sent to him. The document shows the intention of the Railway Company in the matter, and that they considered they were to get for the rent all that the lease purports to give them. That does not appear to be very much displaced by what appears

in evidence now. It appears that the draft was not prepared by the Canal Company by their Counsel, under their instructions, but was prepared on behalf of the Railway Company. Their draft is now produced; and although it is not in such extensive terms, it undoubtedly does give to the Railway Company almost every thing in the possession of the Canal. The language of it is most comprehensive, and is by no means confined to a lease of the tolls and duties in the simple language of the Act of Parliament. It comprises all the lands belonging to the Canal—all the rents of those lands—all the moveable property of the Canal Company, and transfers to the Railway Company almost every thing, except the debentures, which are not given.

Now, that being the case, and the state of the proceedings in point of fact between these Companies, what is the Court to understand from these resolutions? Is it that the agreement was simply and solely for a demise of the tolls under the Act of Parliament? It is perfectly plain that the Railway Company, at all events, did not think that they were dealing for that; they sought a great deal more. Whether the Canal Company would ultimately have acceded to the agreement as construed by the Railway Company, I cannot tell. But the question the Court has to deal with is, not what ultimately would have been done if the parties were well advised and acting legally, but what, to all appearance and apprehension, the shareholders were about to do by these instruments which they were about to execute? And, unquestionably, to all appearance and apprehension there is ample ground for presuming that the Company were about to give something much larger than a simple demise of the tolls and duties under the provisions of the Act of Parliament. They were manifestly dealing with the Railway Company for a demise of all their property, with the single exception of the debentures. It is said that no agreement has been finally come to; perhaps not. But the question is, what would be the agreement, but for the intervention of the Court? Parties who are engaged in an illegal transaction, and to all appearance about to complete it, are not to escape by saying that they would not ultimately have done it—that they were determined

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to go according to the rule of law, and that they were not about to do that which they were purporting to do, and what they were actually engaged in doing. The question is, what was the Company, apparently, and to the apprehension of *bona fide* shareholders, about to do on this occasion? If they were about to do that which the law prohibits, these shareholders have a right to come to the Court and ask for an injunction to prevent them from carrying that purpose into effect.

I have read the Canal Carriers' Act, and considering the localities of the canal and of the railroad, I concur in opinion with the respondents that the Act applies to both Companies. The Railroad Company became a Canal Company, not in name only but in business. They are railroad carriers and canal carriers, and are incorporated for the latter purpose; and though they became a Canal Company subsequently to the Act, still the former Company were in activity at the time, under their Act of Parliament, and the last Canal Act saves to them all the powers which that Company had; and although there might be a question whether a Company established after the 8 & 9 Vic. would be within it, yet I apprehend that on a sound construction of these Acts, if the Canal Company are carriers, they must be considered as having the powers which the Act conferred. I think, therefore, that this Canal Company and the Railway Company are within the 8 & 9 Vic., c. 42, and that, as regards the respective local situations of the Canals, they are within the terms of the Act, perhaps within the spirit also; they do communicate by water, and so far they are within the literal terms of the Act.

But the question which I have to consider is not the case of a simple demise, apart from any other arrangement—a regular demise of the tolls for a pecuniary rent, made according to the express terms of the Act of Parliament. It is impossible not to regard this transaction as one entire arrangement. Though the lease may in terms be within the Act of Parliament, I must look at the spirit of the transaction, and see whether it was designed as an evasion of the law—a mere colourable pretext, for the purpose of effecting that which by law cannot be effected. Looking at the lease as part of a whole arrangement, I cannot

separate it from the rest; and as at present advised, subject to what may be proved in this petition matter, I must consider that this arrangement, being an entire arrangement for completing this transfer, and it being avowed and admitted that it is merely a temporary and provisional arrangement, designed for the purpose of facilitating the parties in obtaining an Act of Parliament for the purpose of transferring the canal to the Railway Company, and to expire when the Act was obtained, was not intended to be a *bona fide* exercise of the powers conferred by the Canal Carriers' Act. It appears to me that if either Company were to file a bill for the purpose of enforcing this part of the agreement, they would be met by the allegation that it was part of an entire agreement, and that the general purpose was an illegal one, viz., to transfer the entire property of the Canal until an Act of Parliament was obtained—that the lease was merely ancillary to that purpose, and was to enable the Companies to deal to all intents and purposes as if they had an Act of Parliament. For these reasons, I cannot disturb the injunction which has been granted, at the application of the shareholders in the Grand Canal Company.

Imputations have been cast on the petitioners in that petition. It has been said that they have in truth no interest in the subject-matter of the suit; that though they show a modicum of interest, it is not worthy of attention, because it does not entitle them to vote at a meeting of the shareholders of the Company. I do not think there is any weight in that argument. Their money, whatever may be the amount of it, is embarked in the concern. The very circumstance of their not being able to vote may be a reason why the Court should take more care of them than it would if they were competent to vote. However, it has been said that they took their shares after notice of this arrangement, and that they were bound by it. With regard to Mr. Guinness, he is confessedly a holder of shares for many years. He was a director of the Great Southern and Western Railway Company, and conversant of the negotiations of that Company for the purpose of getting a transfer of the canal; but he does not appear to have been individually a party to that negotiation. Further than that, it does not appear that a lease of this kind was then contemplated. That was a

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negociation for a purchase to be carried out by an Act of Parliament. There is nothing therefore that should induce the Court to say that Mr. Guinness is not entitled to sustain this petition.

The other petitioner purchased a certain equity, for which he paid his money; he is a shareholder, and therefore fills the position of a person having a pecuniary interest in the concern; and whatever indirect motive he may have had in purchasing the shares, and it is impossible not to see that such a motive did exist, the authorities warrant me in saying that being a holder of canal stock, and thus having money in the transaction, he is entitled to maintain his position in this Court.

In *Bagshawe v. The Eastern Union Railway Company (a)*, the Lord Chancellor said:—"Now, it is in vain to speculate on what motives the parties may have had in advancing their money. It may be that the plaintiff here had an independent private reason for promoting a railway to Harwich. It may be that they who subscribed the £100,000 may have had some reason for promoting the purchase of the railway to Hadleigh by the Eastern Counties Railway Company. It is impossible to speculate on that; every man acts, of course, according to his own view of his own interest and wishes; and the question is, whether the law will permit money advanced for one purpose to be applied, contrary to the wish of the owners of that money, to another, and where the bill states such a case as brings it within that principle."

The case, however, most in point is that of *Colman v. Eastern Counties Railway Company (b)*, in which the plaintiff had but one share, and was in the employment of the Company; and it was held that it was not an objection to his sustaining the suit, that he was in the service of the Company, there being no charge that he was not suing in his own behalf.

With regard to the argument that there has been acquiescence in this case, I do not think much can be made of that. I do not think that that is any ground of objection against the right to maintain the suit in the case of the Canal Company; and, as I have already said, considering this attempt to make use of the powers conferred

(a) *Ubi supra.*

(b) *Ubi supra.*

by the Canal Carriers' Act, to be merely a contrivance to carry out the design of the parties, by taking a lease of the entire of the property of the Canal Company, and all its concerns, according to the agreement, there is sufficient to warrant the Court in maintaining this injunction, which I look on as an injunction, not against a simple, plain and *bona fide* dealing between these Companies, for the letting of the tolls. I have read over the order for the injunction carefully, and I do not think it will prevent any thing but acting on the agreement already made, treating it as an agreement for the transfer of the entire canal. The words are, "to restrain the Grand Canal Company and their directors, officers and agents, from putting the seal of the said Company to, or otherwise executing or causing or permitting the execution of the engrossment of the draft deed or lease, of the Grand Canal, or of the tolls, rates or duties thereof, by the said Grand Canal Company, to the Midland Great Western Railway of Ireland Company, read or referred to at the meeting of the said Canal Company, in the petition mentioned, held on the 19th day of February 1853; or of any other deed to be settled pursuant to the resolution passed at the said meeting, or any deed, lease, or contract for a lease, comprising the terms contained in the report of the directors of the said Grand Canal Company, in the petition mentioned, or to the like effect"—that is an agreement for the transfer of the Canal concerns to the Railway Company; "and also to restrain the said Grand Canal Company and their directors, officers, agents and servants, from delivering possession of the said Grand Canal, or the steam tug-boats, barges, vessels, horses, waggons, carts, warehouses, stores and other the property of the said Grand Canal Company, or any part thereof respectively, to the said Railway Company; or from giving to or permitting the said Railway Company to receive or take the rents and profits of the lands, tenements and hereditaments of the said Grand Canal Company, or the water-rents or rates payable to the said Grand Canal Company by the inhabitants of the city of Dublin and its neighbourhood, or any part thereof respectively, as therein mentioned, or in any manner from acting upon the agreement for a lease, in the petition mentioned"—still, confining the injunction to carrying out the

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particular agreement for a lease, "and also to restrain the said Railway Company, their directors, &c., from taking possession of the said Grand Canal, &c., or any part thereof, and from receiving or taking the said rents, and water-rents or rates, or any part thereof." I apprehend that that still refers to the agreement, and solely to the agreement between the Companies, because it must be taken *secundum subjectam materiem*. Perhaps it would have been more accurate to have added to that latter part of the order the words, "pursuant to the said agreement," for that was the object of the injunction, and I think it might be amended in that respect. If the parties enter into a definite, plain and *bona fide* agreement for a demise of the tolls, and it can lawfully be done under the 8 & 9 Vic., c. 42, there is nothing in the injunction order to prevent their doing that—I say nothing on that subject. I think the words, "pursuant to the said agreement," should be added at the end of the injunction, so as to confine it to the particular agreement, which is an agreement for the transfer of the entire canal.

With regard to the other case, having confirmed the order for an injunction against the Grand Canal Company, it is of little consequence what becomes of it. At the same time, I am bound to make an order in that case also; and if the circumstances of it were similar to the case of the Grand Canal Company, I should be warranted in making a similar order: but there is a considerable difference in the circumstances of the two cases. In the case of the Midland Great Western Railway Company, I have not before the Court any shareholder who was a shareholder before the transactions complained of took place. But the difference does not stop there, for I have not before me any one who can be regarded as a *bona fide* shareholder. The petitioners, with full knowledge of the transaction, for the purpose of intervening in a concern in which they had no property, and preventing this transaction, got transferred to them shares for a nominal consideration, for the purpose of filing this petition, just when the transaction was about to be completed. This Court is not to be made the instrument of such a proceeding. I have read, with some pain, the statements put forward by these gentlemen in the petition. No one, on reading those statements, would doubt

that these gentlemen had a pecuniary interest in the Company, and that their property was endangered by these proceedings, and that they intended to oppose the bill in Parliament on that account. It turns out that these gentlemen have got shares, for a nominal consideration of five shillings, and the real owner of the shares, Mr. Williams, does not come forward at all to present a petition. I do not know what secret contract there may be for handing back these shares to the persons from whom they were procured; and it is a strong thing to say that the Court is, at the instance of parties who have no pecuniary interest, to intervene to stop proceedings which, for aught I know, may be beneficial to all the parties concerned. In every injunction case, the Court must look to the conduct of the parties. In *Williams v. Lord Jersey* (a), the plaintiff was held not to be entitled to the interposition of the Court on that ground; and in *Graham v. The Birkenhead Railway Company* (b), Lord Cottenham discharged an injunction, on the ground that the parties had lain by and had allowed the works to proceed, and the expense to be incurred. Lord Cottenham says in that case:—"The question is, whether they who are now complaining and suing in respect of their interest in the money which they have paid, have, by the course of conduct which they have pursued, precluded themselves from coming to a Court of Equity to keep the parties strictly to that which was originally their right under the Acts. Such matters must be in the discretion of the Court; and, in the exercise of that discretion, I cannot say that it is at all questionable by which decision the interest of the parties will be best consulted. As the matter stands, my opinion certainly is, that the interest of the parties would be best consulted if I were not to interfere by way of injunction. But, assuming that the parties knew, as they must have known, what the course of proceeding was, I consider that they have precluded themselves from coming to a Court of Equity to ask for the exercise of its extraordinary jurisdiction, by the course which they have pursued in not coming earlier."

The facts of that case were not the same as this; but the prin-

(a) *Ubi supra*.

(b) 2 Hall & Tw. 456.

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*Judgment.*

ciple is the same, that these injunction orders are to a certain extent in the discretion of the Court; and I confess I think it a wholesome exercise of discretion to say to parties who have purchased for five shillings a right of suit, that they shall not have the assistance of the Court to carry out their object.

On these grounds, therefore, if this were the only petition before the Court, there would be no difficulty in the case. Whatever public policy may be involved on one side, I am quite sure that on the other side public policy requires that the Court should not allow itself to be put into action by parties who have got shares transferred to them for a nominal price, simply for the purpose of giving them a right to come to this Court. For the sake of public policy and example, I am bound to reverse the order of the Master of the Rolls. As I confirm the order in the case of the Grand Canal Company, that reversal will have little effect; but I am bound to discourage a proceeding of this sort.

July 9, 11.  
 Dec. 23.

**MAGHEE v. M'ALLISTER.**

A marriage celebrated in England, between a native and domiciled Scotchman and an Irish-woman, may be dissolved by a decree for a divorce pronounced by the Court of Session in Scotland.

THE petition in this matter was filed under the Court of Chancery (Ireland) Regulation Act 1850, for the partition of certain freehold property in the county and city of Dublin, the estate of G. F. Winstanley. The petitioners Mary Andrews Maghee and Eleanor Margaret Wallis and the respondent Mary Adelaide Brabazon, otherwise M'Allister, otherwise Weiss, otherwise Lyon, were co-heiresses of G. F. Winstanley. Mary Adelaide Brabazon had been twice married, first to Charles Somerville M'Allister, from whom she was divorced by the decree of a Scotch Court in 1846, and secondly to W. W. Weiss. Both husbands were alive, and each claimed her share of the property of G. F. Winstanley, in his marital right, and both were made respondents. The petition was

heard on the 9th of July 1851, when a decree was pronounced, referring it to the Master to inquire and report whether the respondents Charles S. M'Allister and William Willoughby Weiss, or either of them, have or bath any and what estate or interest in one-third of said freehold and personal estate and property therein declared to belong to the respondent Mary Anne Brabazon M'Allister, otherwise Weiss, subject to such rights, if any, as aforesaid, and when and how acquired. The Master's finding was grounded on a consent of all parties, bearing date the 1st of July 1853, and was as follows :—

“I find that the said Charles Somerville M'Allister is the eldest son of Charles S. M'Allister, Esquire, and Mrs. M'Allister his wife, of Kennox in Ayrshire, in that part of the United Kingdom called Scotland, and was born of Scotch parents, and that the said C. S. M'Allister left Scotland in the month of April 1824, and resided out of Scotland, in England, and abroad until the month of September 1827, and that the said M. A. B. M'Allister, otherwise Weiss, otherwise Lyon, met the said respondent Charles S. M'Allister for the first time in France, where she remained for a few months previous to her marriage with the said respondent; and I find that in the month of September 1827, the said C. S. M'Allister returned to Kennox aforesaid, and remained there for three months, and that in December 1827 he went to London; and I find that on the 28th of January 1828, a marriage was duly had and solemnised between the said C. S. M'Allister and the said M. A. B. M'Allister, otherwise Weiss, otherwise Lyon, in London, and that after the said marriage, in May 1828, the said C. S. M'Allister, with the said Mary Adelaide Brabazon, his then wife, returned to Scotland and resided there until November 1829; and I find that in November 1829, the said C. S. M'Allister, with the said M. A. Brabazon his wife, left Scotland and went to France, where they resided until the year 1839, when they returned together to England; and I find that immediately upon the return to England of the said C. S. M'Allister and the said M. A. Brabazon his wife, the said M. A. Brabazon separated herself from the said C. S. M'Allister, and that the said C. S. M'Allister thereupon returned to Scotland,

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and has still continued to reside there; and I find that shortly afterwards the said C. S. M'Allister instituted a suit for a divorce from his said wife, in the Court of Session in Edinburgh in Scotland, for desertion and non-adherence; and that thereupon a decree of divorce, on the ground of desertion and non-adherence, was, in accordance with the law and practice of Scotland, pronounced in due form in the said suit by the said Court, between the said C. S. M'Allister and the said M. A. B. M'Allister, otherwise Weiss, otherwise Lyon; and I find that the said decree bore date the 27th day of February 1846; and that according to the law of Scotland, as administered in Scotland, the said Court of Session was authorised to make and pronounce the said decree in Scotland, and that the said decree is still in full force and effect.

"I find that on the 17th day of October 1846, a ceremony of marriage was performed between the respondent W. W. Weiss and the said M. A. B. M'Allister, otherwise Weiss, otherwise Lyon, in Edinburgh in Scotland aforesaid, in conformity with the form as required by the Established Church of Scotland; and I find that the said C. A. B. M'Allister, by virtue of the aforesaid marriage, is absolutely entitled to that portion of the one-third of the said freehold and personal estate and property, in your Lordship's order declared to belong to the respondent M. A. B. M'Allister, otherwise Weiss, otherwise Lyon, which consists of personal estate, upon his reducing the same into possession during the life of the said M. A. B. M'Allister; and that the said Charles S. M'Allister is entitled, during the joint lives of himself and the said M. A. B. M'Allister, &c., to the issues and profits of that portion of the said one-third which consists of freehold estate."

W. W. Weiss excepted to the report, that the Master should have found that he was entitled to the freehold and personal property to which C. S. M'Allister had been reported entitled; and the cause now came on to be heard on report, exceptions and merits.

*Argument.*

Mr. F. Fitzgerald and Mr. James Hamilton, in support of the exceptions, contended that C. S. M'Allister being a domiciled Scotchman, his marriage, though celebrated in England, was a

Scotch marriage, and was dissolved by the decree for a divorce by the Scotch Court; and that having sought for and obtained that divorce, he was estopped from denying its effect and claiming the property of his former wife. They cited *Birtwistle v. Vardill* (a); *Warrender v. Warrender* (b); *Conway v. Beasley* (c); *Cottingham's case* (d); *Ross v. Rose* (e); *Munro v. Munro* (f); *Somerville v. Somerville* (g); *Geils v. Geils* (h); *Robinson v. Bland* (i).

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Mr. *Andrews*, Mr. *Miller* and Mr. *Johns*, contra., contended that the marriage was to be determined by the law of the place where it was celebrated, and was consequently an English marriage, still subsisting, and unaffected by the decree of the Scotch Court: *Lolly's case* (k); *McCarthy v. De Caix* (l); *Connelly v. Connelly* (m); *Story's Conflict of Laws*, pp. 54, 91, 99, 100, 109, 282, 613.

Mr. *Robert R. Warren*, for the plaintiff.

THE LORD CHANCELLOR.

This case is one of great importance; and although I think there is much difficulty in the question which I have to decide, if the case is to go to the House of Lords, there would not be much use in incurring the expense of sending the case for the opinion of a Court of Law.

Judgment.

My present impression is, that the marriage with Mr. M'Allister was a Scotch marriage, and therefore, that the decree for a divorce by the Scotch Court dissolved it. The case of *Munro v. Munro* establishes that a marriage between a Scotchman and an Englishwoman, though celebrated out of Scotland, is a Scotch marriage, so as to have the effect of legitimising children born before the mar-

(a) 2 Cl. & Fin. 571.

(b) 2 Cl. & Fin. 488.

(c) 3 Hag. 630.

(d) 2 Swanst. 328.

(e) 4 Wils. & Sh. 289.

(f) 7 Cl. & Fin. 842.

(g) 5 Ves. 750.

(h) 17 Jur. 423.

(i) 2 Bur. 1078.

(k) Russ. & Ry., C.C., 237.

(l) 2 Cl. & Fin. 567.

(m) 7 Notes of Cases in Ec. C. 44.

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riage, according to the rule of the Scotch law. The opinions of Lord Brougham and Lord Lyndhurst, in *Warrender v. Warrender* (a)—of Lord St. Leonards, in *Geils v. Geils* (b)—of Dr. Lushington and Mr. Justice Story, appear to be that a marriage such as this is a Scotch marriage. All the inconveniences and anomalies which are referred to by Lord Lyndhurst can be avoided in no other way than by holding a marriage such as this to be a Scotch marriage; domicile is, in my opinion, to determine the question.

I might determine this case on the ground of estoppel, and hold that this gentleman, having applied to and obtained a divorce from a Scotch Court, ought not to be heard to deny the effect of that divorce, and claim property which is admittedly that of the wife. But that would not be a satisfactory ground on which to decide a case such as this. Having regard to *Warrender v. Warrender*, *Munro v. Munro* and *Geils v. Geils*, I must hold this to be a Scotch marriage. *Lolly's case* is distinguishable; for in that case, both the parties were English, and had an English domicile. In *M<sup>c</sup>Carthy v. De Caix* (c), the question as to the effect of the divorce was not argued; and Lord Brougham, by the observations at the conclusion of his judgment, took care to guard himself against the supposition that he approved of, or would consider himself bound by, *Lolly's case*.

My present impression is, therefore, that this was a Scotch marriage, and dissoluble by the Scotch law. I do not think it necessary to make any further observations on the question. I should only be repeating the observations of the learned Judges in the cases which have been referred to, and those of Mr. Justice Story, in his work on the *Conflict of Laws*.

#### THE LORD CHANCELLOR.

Dec. 23.

I have looked into the authorities in this case, and I remain of the opinion which I expressed at the conclusion of the argument, viz., that the divorce dissolved the first marriage, and consequently that the second marriage is valid, both in this country and in Scotland, and Mr. Weiss is entitled to the property, in his marital right.

(a) 2 Cl. & Fin.

(c) 2 Cl. & Fin. 568.

(b) 17 Jur. 123.

The question is one of novelty and considerable difficulty, and one which I cannot approach without much doubt and hesitation. The first marriage was celebrated in England, between an Irishwoman and a Scotchman. He had not changed his domicile at the time of the marriage. He returned to Scotland with his wife, and she became a domiciled Scotchwoman, and amenable to the jurisdiction of the Scotch Court. The case of *Warrender v. Warrender* is expressly in point; and acting on that case and *Munro v. Munro*, I am bound to hold the marriage to have been a Scotch marriage, notwithstanding *Lolly's case*. It was held in that case that a marriage celebrated in England, the parties being both English, could not be dissolved by the Scotch Courts. The parties in that case were not domiciled in Scotland, and had gone there merely for the purpose of getting rid of the marriage. Whether that case be followed or overruled, I think it plain that the principle of it will not be extended, and ought not to be applied to a case like the present, where one of the parties was, at the time of the marriage, a domiciled Scotchman.

I shall therefore allow Mr. Weiss's exception.

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*Chancery.*  
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ELLIS v. O'NEILL.

1854.  
April 29.  
June 3.

THIS case came before the Court upon motion by way of appeal from an order of the Master of the Rolls, dated the 23rd day of February 1854, whereby his Honour affirmed the report of the Master to whom these matters were referred, overruled the objections to the same report, and ordered the petition in the second matter to be dismissed, with costs (*vide supra*, p. 280).

Where there is no evidence of the payment of tithes from a particular denomination, for sixty years next preceding the establishment of a composition in lieu of tithes

in the parish, the presumptive bar thus created under the 1 & 2 Vic., c. 109, s. 18, is not avoided by showing that the tithes of the lands in question had amongst others been demised to a person, not in privity with the lands, for a term which was subsisting at the date of the passing of the said Act.

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*Chancery.*  
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 v.  
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*Statement.*

The original petition in these matters was presented in the month of January 1840, and the petitioner thereby prayed for a receiver, under the Tithe Rentcharge Act, over certain lands.

The original petition in the second matter was presented on the 24th of January 1840, by the owner of the lands of Moher, Ballinclare, Gortgallon and Clonadra, to have them declared tithe free.

By an order of the 15th of April 1840, it was referred to Master Townsend, to inquire whether any and which of the said lands would have been rightfully charged with composition for tithes in case the Tithe Rentcharge Act had not passed; and whether the right of exemption from the payment of tithes existed, and was acted upon, at the time of, or within one year next before, the establishment of a composition in lieu of tithes in the parish in which the said lands were situate?

No effectual proceedings were taken on either petition after the above order was obtained, until the 2nd of February 1848, when it was ordered that the petitioners in both matters should have the benefit of the original proceedings; and that Master Brooke should proceed under the said reference of the 15th of April 1840, and that Lord Trimbleston's solicitor should have notice of the proceedings before the Master. Some of the parties having died, an order in the nature of an order of revivor in both matters was made on the 24th of April 1850.

The Master at first found that no tithes were paid out of any of the lands save Gortgallon; but afterwards, on hearing Counsel on behalf of Lord Trimbleston, in pursuance of leave given, he made his report, by which he found that all the said lands would have been rightfully charged if the Tithe Rentcharge Act had not passed. He further found that, though the parties went into evidence as to the fact of payment of tithes in respect of each of the said several lands during the sixty years next preceding the establishment of a composition in lieu of tithes in the said parish, there was no sufficient evidence to show that any tithes had been paid during any part of that period out of Moher, Ballinclare or Clonadra; but that Lord Trimbleston having proved that all the tithes of the said parish had been by indenture of renewal, bearing date the

1st day of August 1832, demised to R. Armstrong, sen., R. Armstrong, jun. and Charles Armstrong, which lease was, at the time of making such composition subsisting; he found that the right of exemption from the payment of tithes did not exist, and was not acted upon as to the said lands, or any of them, or any part thereof, at the time of, or within one year next before, the establishment of the tithe composition in the said parish.

Objections were taken to this report on behalf of the petitioners in the second matter, objecting that the Master should have found that the lands of Moher, Ballinclare and Clonadra were exempt from tithes; upon which objections the order was made which was the subject of this appeal.

Mr. *Deasy*, for the appeal.

We prove that no payments were made in respect of three of the denominations, and we rely on the 18th section of the Rentcharge Act; but the other side rely on the provisions of the 20th section, which we submit only apply to cases where the tithe was demised to the owner or occupier of the land; if it were not so confined, it would altogether abrogate the provisions of the Act.

Mr. *F. Fitzgerald*, contra, cited *Denny v. Devonshire* (a); *Salkeld v. Johnston* (b).

THE LORD CHANCELLOR.

In these cases the first petition was presented under the 30th section of the Tithe Rentcharge Act, 1 & 2 Vic., c. 109, for the purpose of obtaining the appointment of a receiver over certain lands, to enforce the payment of tithe rentcharge alleged to be payable thereout. The second was presented under the 16th section of the same Act, by the person supposed to be liable to the payment of such rentcharge, and prayed that the lands might be declared tithe free by the provisions of the same Act. The case seems to have been long pending. The original order, referring it to the Master to inquire and report whether the lands in question were exempted

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Statement.

Argument.

June 3.  
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(a) 1 Ir. Ch. Rep. 401, 657. (b) 1 Har. 196; S. C., 1 M'N. & G. 242.

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*Chancery.*  
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*Judgment.*

from tithe, was made on the 15th of April 1840. The proceedings, however, were afterwards revived; and by an order bearing date the 24th day of February 1850, it was referred to the Master to proceed on that original order of reference; and the case now comes before the Court upon Master Brooke's report, which finds that those lands are liable to the payment of tithe rentcharge. To that report objections were taken, and a motion was made to vary it in accordance with the objections filed by the respondents in the first matter. Now, the first of these objections is, that the case comes within the 18th section of the 1 & 2 *Vic.*, c. 109, and that it is not taken out of that by the operation of the 20th and 21st sections of the Act.

The material facts of the case are shortly as follow:—The original title to those tithes, which are claimed as issuing out of four denominations—Moher, Ballinclare, Gortgallon and Clonadra, respectively situate in the parish of Clontuskert, was vested in Lord Kingsland; and he, by a lease bearing date the 28th day of August 1766, demised to Ulick Burke certain impropriate tithes, including those of three of those denominations, for three lives, with a covenant for perpetual renewal. The estate of Lord Kingsland became vested in Lord Trimbleston, and that of Ulick Burke in persons of the name of Armstrong, who are represented by the respondents in the second matter. Several renewals of the lease were executed—one in 1813, and one in 1832, to the Armstrongs.

As to the actual payment of the tithes, the Master has found, "That though the parties went into evidence as to the fact of payment out of each of the said several lands during the sixty years next preceding the establishment of a composition in lieu of tithes in the said parish, there was no sufficient evidence to show that any tithes had been paid during any part of that period out of Moher, Ballinclare and Gortgallon." With regard to the fourth denomination, there is no particular finding, but it is, I believe, conceded that payments in respect of it have been proved, and there is therefore no question in respect to it. The report then proceeds:—"But the said Lord Trimbleston having proved before me that all the tithes of the said parish had been by indenture of renewal, bearing date the

1st day of August 1832, in the first schedule hereunto annexed mentioned, demised to Richard Armstrong, Richard Armstrong, junior, and Charles Armstrong, and which lease was at the time of making such composition, and still is, subsisting; I find that the right of exemption from the payment of tithes did not exist, and was not acted upon as to said lands or any of them, or any part thereof, at the time of or within one year next before the establishment of a composition in lieu of tithes, in the parish of Clontuskert, in the county of Roscommon." Thus, as to three denominations he finds in substance this, that there is no sufficient evidence of any payment being made on account of tithes during sixty years before the establishment of the tithe composition, but that by reason of the tithe being demised, not to the owner or occupier of the land, but to a third person, the case is brought within the provisions of the 20th section, and the provisions of the 18th section are shown to be altogether inapplicable.

As to the fourth denomination, payment of tithes in respect of it has been proved, as I have already stated, and it is therefore not now the subject of any question.

The case on behalf of the petitioners in the second matter is therefore reduced to this position, that within the meaning of the 18th section those lands are to be deemed exempt from payment of tithe rentcharge, because in the words of that section it is enacted, "That all prescriptions and claims of or for any *modus decimandi*, or of or to any exemptions from or discharge of tithes, shall in all cases whatever be deemed good and valid in law, upon evidence showing, in cases of a claim of *modus decimandi*, the payment of or render of such *modus*; and in cases of claim to exemption or discharge, the enjoyment of the land without payment or render of tithes, money or other matters in lieu thereof, for the full period of thirty years next before the establishment of a composition for such tithes, under the Acts for that purpose made, unless in case of a claim of a *modus decimandi* the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality or quantity from the *modus* claimed, or in case of claim to exemption or discharge, unless the render or payment of tithes

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*Chancery.*  
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 ———  
*Judgment.*

or of money or other matter in lieu thereof shall be shown to have taken place at some time prior to such thirty years; or it shall be proved that such payment or render of *modus* was made, or such enjoyment was had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim of exemption shall be extended to the full period of sixty years next before the establishment of such composition, such claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of *modus* was made, or such enjoyment was had by some consent or agreement expressly made or given for that purpose by deed or writing." It is said then, that as the Master has found that for the whole period of sixty years these lands have been held without payment of tithes, and that this enjoyment of the lands free from tithe has occurred without the existence of any consent or agreement by deed or in writing for that purpose, the consequence must be that the claim of exemption is absolute and indefeasible, unless it be brought within the operation of the 20th or 21st section. It was then contended on behalf of the parties claiming the tithe as owners, that, on the true construction of the 20th section, the simple fact that the tithes had been demised by deed, for a term of lives subsisting at the time of the passing of the Tithe Rentcharge Act, was in itself, no matter who the person might be to whom such demise was made, sufficient to take the case out of the 18th section. But to this it was on the other hand replied, that such was not the true construction of the 20th section; and that having regard to the language of that section and to the general scope and intention of the Act, the mere circumstance of the tithes having been demised to a third person, in no way in privity with the owner of the lands for which exemption was claimed, and demised by an instrument, the existence of which the owner of such land might never know or hear of, could not at all interfere with the operation of the Act, so as to deprive the proprietor of the benefit which that Act was intended to confer.

The case thus lies within a very narrow compass; it depends on the construction of the 20th section, considered in respect to its own language as well as to the other portions of the Act. By that

section it was enacted:—"That the provisions herein before contained, with respect to the establishment of claims of or for any *modus* or exemption from or discharge of tithes, shall not extend to any case where the tithes of any land shall have been demised by deed for any term of life or number of years, or where any composition for tithes shall have been made by deed or writing by the person or body corporate entitled to such tithes, with the owner of or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this Act." Now, beyond all possibility of doubt or question, the words of that section as to compositions apply only where the composition was between the tithe owner and the assumed tithe payer; and had there been two words inserted in this section in addition to its present language, there would be no question to discuss; all we have to do is to insert the words "to or." If the section ran, "That the provisions of the 18th section shall not extend to any case where the tithes of any land shall have been demised, or any composition shall have been made by the person entitled thereto, *to or* with the owner or occupier" of the land, then the clause would have been express and definite. Now, at the very first sight of the entire section, it strikes one as difficult to see what connection there can be between the claimant for exemption and a demise to a third person, so as in any way to affect the claimant. We can see that when there is any dealing between the tithe owner and the tithe payer, that operates first as an acknowledgment of the right of the tithe owner; and secondly, as a suspension of that right; but in this case there is no connection between the proprietors of the land and the dealings of the tithe owner: and it does seem a strong proposition to assert that, because of the existence of a lease to a third person, the proprietor of the land was to be remitted to the old doctrines of law, in order to defend the exemption of his property; I think that would be a hardship on the proprietor, for I apprehend the object and intention of the whole of this portion of the Act was to settle the position of the landowner, and to give him a mode of proving his title to exemption more easy and more suited to modern ideas; and though

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it is open to argument that the word "demised" is not in the section necessarily connected in strict grammatical construction with the words "owners or occupiers," the question remains, whether it is not so connected in object and intention? Against that construction it has been urged, that the effect of it would be to prevent a tithe owner from recovering, if he had demised to a third person, who neglected his rights and whose estate continued for two or three days after the passing of the Act, although rent had been paid in respect of those very tithes : and that does seem a fair objection. But if we take the case of the lease expiring a few days before the passing of the Act, there is no provision to exclude the tithes included in such a lease from the operation of the section. The Act carries on in the 21st section the subject of exception introduced by the 20th section ; it is there enacted :—  
 "That where any lands or tenements shall have been held or occupied by any rector, vicar, or other person entitled to the tithes thereof, or by any person compounding for the tithes with any such rector, vicar, or other person, whereby the right to the tithes of such lands may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time hereinbefore mentioned."

This is applicable to the converse of the case ; and I think it fully proves that the provisions are not applicable to a case like this before me, for it provides most precisely for all rights which, as it appears to me, it means to preserve ; but none of the savings are framed to meet the present question ; and as I have already observed, there is no provision to exclude tithes which may have been demised to a third person by an instrument not in force at the time of the passing of the Act. Therefore, when I find every necessary provision complete to exempt the tithe owner from the limitation, when he is in privity with the land, and nothing expressly pointed to a saving of his rights, when the demise is to third persons, I think it is difficult to say that the 20th section is to be read in reference to its literal terms rather than to the general scope of the Act.

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It is then said that these provisions are in a great manner adopted from those of the 2 & 3 W. 4, c. 100, the analogous English Act; and it is submitted that whatever may be the construction of the one ought also to be the construction applied to the other; that they are *in pari materia*, and to be considered together. Suppose that argument even to be well founded, I think that the true construction of that Act is, that it applies only to dealings between tithe owners and occupiers. The words are:—“Provided also, and be it further enacted, that this Act shall not extend or be applicable to any case where the tithes of any lands tenements or hereditaments shall have been demised by deed for any term of life or number of years, or when any composition for tithes shall have been made by deed or writing by the person or body corporate entitled to such tithes, with the owner or occupier of the land for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this Act.” So far the words are the same in both Acts; but the English Act then goes on:—“And when any action or suit shall be instituted for the recovery or enforcing the payment of tithes in kind within three years next after the expiration, surrender or other determination of such demise or composition.” Now, what is the meaning of that latter portion? Is it not plainly that it contemplates the existence of some demise which would interfere with the payment of tithes in kind; but properly speaking, when there is a suit for the payment of tithes in kind, a lease between the tithe owner and a third person would have nothing to do with the question as to such payment. I cannot think that this clause could have meant any lease, save one which interfered with the payment of tithe in kind; therefore, so far from the analogy of the English Act affording an argument in favour of the construction adopted in the Court below, I think it is an authority the other way, and that it shows that the demise mentioned in it is one which in itself must interfere with the recovery of tithe in kind, that is, the species of tithe which by the operation of the instrument the tithe claimant was prevented suing for.

It seems to me, therefore that, whether we consider the words  
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*Chancery.*  
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of the statute with reference to its true scope and intention, or whether we compare this with other enactments *in pari materia*, we must come to the conclusion that what was really contemplated was, a dealing between the owner of the tithe and the owner or occupier of the land, and not a mere separate transaction between the tithe owner and third persons.

The consequence of a different construction would be to exclude almost all lay tithe in Ireland from the operation of the Act altogether; for I believe there was hardly any which was not in lease at the time of the Act; and the owners in fee would thus be able to defeat the statute, though the lessees were barred over and over again.

Then it is said that this is to be considered with reference to the English Prescription Act; but that is a very peculiar statute, containing very peculiar provisions. In the first place, it is not framed for the purpose of establishing a right against land, but for limiting the time necessary for acquiring easements. It does contain, however, a saving of great importance—proving at least this, that when the Legislature meant to provide for the case of reversioner and tenant, it knew perfectly well how to accomplish this result. The 8th section provides:—"That when any land or water, upon, over or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of the forty years, in case the claim shall, within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof."

That is an express clause taking care of the interest of a reversioner: that very clause shows how completely this could be effected when it was the intention of the Legislature; and when it is said that the provisions of the Tithe Composition Act were partially

adopted from the former, that is in itself a strong argument to show that it did not intend to exclude such cases.

I will not go further into this case. When it was opened, I did think that the proposition for which the petitioners in the first matter contend was untenable, an opinion which I still retain; but I am unwilling to decide this case—which is one purely of law—on the construction of an Act of Parliament, against the opinion of the Master, and the Master of the Rolls, upon a proceeding of this nature, from which there is no further appeal, and when, consequently, my judgment must be final, without giving to the unsuccessful parties, if they desire it, an opportunity of obtaining the opinion of a Court of Law; not that I entertain any doubt on the subject myself, but from respect to the opinions opposed to mine, and regard to the circumstance that, in this form of proceeding there is, as I have observed, no further appeal.

*Gen. Hearing Book, 12, f. 165.*

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*Chancery.*  
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*Judgment.*

EARL OF MOUNTCASHELL *v.* VISCOUNT O'NEILL.

May 27,  
June 3.

THE facts of the case, so far as they are material, are sufficiently stated in the report of the case at the Rolls (*ante*, p. 455) and in the judgment of the LORD CHANCELLOR.

Mr. *Drury* and Mr. *Lawson* for the petitioner.

Mr. *Hughes* and Mr. *Joy* for the respondent.

The LORD CHANCELLOR.

In this case, in which the Earl of Mountcashell is the petitioner,

brought to try the legal right. An action having been brought, the respondent obtained the judgment of the Court of Exchequer Chamber, one Judge alone dissenting. The petitioner sued out and prosecuted a writ of error to the House of Lords.

*Held*, reversing the order at the Rolls, that the injunction ought to be continued.

An injunction against felling timber was obtained against the respondent; but the respondent by his affidavit in answer claimed the timber as his own property; and on a motion to dissolve the injunction, founded on that affidavit, the Court directed an action to be

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*Chancery.*  
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 ———  
*Judgment.*

and Lord O'Neill the respondent, an application has been made to this Court to vary an order pronounced by his Honour the Master of the Rolls, by which he dissolved an injunction which he had previously granted. The object of this application is to continue that injunction until final judgment shall have been given in an action which is now depending between the same parties, and which is *in transitu* to the House of Lords.

The facts of the case are so clearly stated in the judgment delivered by the Master of the Rolls (a copy of which he has kindly sent to me), that I think I might simply adopt from that judgment his Honour's statement of the facts, presented as they are to the Court in a petition of a very ordinary character. It is a petition presented by a reversioner who complains that his tenant is about to cut down timber trees growing on the premises, in derogation of the rights of the petitioner. The parties stand in the relative position of landlord and tenant; Lord Mountcashell representing the inheritance, and Lord O'Neill the tenant's interest. By the lease, the lessee is not entitled to cut timber trees growing on the premises, and it was therefore a matter of course to grant the original injunction till answer and further order. Accordingly, the Master of the Rolls did on this *prima facie* case grant such an injunction; the respondent subsequently came into Court upon the filing of his answering affidavit, and moved to dissolve the injunction, having made a case which, if sustained, is without a question a complete and perfect answer to the petitioner's claim; the respondent's case being, in fact, that these trees, which have now become timber trees, had been planted since the commencement of the lease, and that they had been in fact registered under the Timber Registry Acts, 5 & 6 G. 3, c. 17, and 23 & 24 G. 3, c. 49. Of course, if that case were established, there would at once be an end to all pretence of claim on the part of the petitioner: however, when this motion came before the Master of the Rolls, he arrived at the conclusion that it was not a case in which he ought to decide between the conflicting claims, either by dissolving or continuing the injunction, and the course which he adopted was that of permitting the motion to stand over, giving liberty to the

petitioners, or either of them, to proceed at law to establish their rights, and giving liberty to either party to apply. I may observe that it was of little moment in this case who was the plaintiff in the action, but in point of fact it rather lay on Lord O'Neill to displace the *prima facie* right of the petitioners to the timber growing on their inheritance. Accordingly, in pursuance of the liberty given in the Rolls order, an action of trover was brought, in which Lord Mountcashell was the sole plaintiff, and the respondent was the sole defendant. Upon the trial of that action, in order to have the opinion of the highest appellate tribunal, a case was framed in the nature of, and which was turned into, a special verdict. Now, it is quite clear that it is not for this Court to investigate any of the proceedings in that cause—that here no question can be raised on any of the intermediate steps in an action at law, and that no consideration can be given to any thing save the ultimate result; so far the authorities are quite clear. We are here only to consider what was the ultimate result in this case? Whether in the present stage it can be said to have reached that terminus? On that special verdict there was an argument in the Court of Queen's Bench, the result of which was as follows:—there were three points in the case; one applied to a very small portion of the timber, and with respect to that, the Court was unanimously of opinion that the registry was insufficient. On the other two points there was a difference of opinion, but the decision on the main question, which applied to six out of the eight registries, was in favour of Lord O'Neill; the Chief Justice alone disapproving of the judgment. On the remaining point the decision was against the respondent, but was opposed by the opinion of Crompton and Perrin, J.J. Though Lord O'Neill had thus succeeded in respect to much the larger portion of the timber, he did not think fit then to move to dissolve the injunction, and writs of error were brought by both parties—by the petitioner against the main decision, by the respondent against the residue; and the case then came before the Exchequer Chamber, which decided in all points in favour of Lord O'Neill. The consequence then is, that Lord O'Neill has sustained the entire claim of property in the trees, which he had

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set up in his answering affidavit, the Lord Chief Justice of the Queen's Bench, who maintained the opinion he had expressed in the Court below, being the only dissentient Judge. So far as respects the tribunals in this country, there has been, therefore, a final determination in favour of Lord O'Neill. On the part of Lord Mountcashell it has been alleged that the petitioners have been *bona fide* advised that the decision of the majority of the Court of Exchequer Chamber here is wrong, and that the Chief Justice is right; that they have applied for a writ of error to the House of Lords, and that they are proceeding thereon with all possible diligence; and they ask that, during the pending of the proceedings there, the injunction may be continued. Matters being in this state, the motion for dissolving the injunction was renewed before the Master of the Rolls, and he came to the conclusion that he ought to consider the judgment of the Exchequer Chamber as final, and that in a sound exercise of his discretion he ought not to continue the injunction. The present case is an appeal from that decision. It must be considered singular that an application of this nature should be so rare that there is no reported decision turning upon the question whether a Court of Equity should suspend the rights of the party successful at law, pending the prosecution of a writ of error; though the authorities are numerous on the somewhat analogous point, the power of the Court to suspend the execution of its own decrees, pending an appeal. On this subject there are decisions both ways, varying according to the position of the parties before the Court, and I think I may say, showing that the result of such an application is in the discretion of the Court; that it has power to stay execution, but that such power is to be exercised with the greatest possible caution; the Court rather inclining against the propriety of delaying the successful party, unless the circumstances show that consistently with a sound exercise of such discretion he ought not to be permitted to proceed at once. The circumstance which in these cases weighs most with the Court is, on which side the balance of inconvenience, or as here it may rather be called, the balance of danger, most inclines; I must, therefore, consider this, which was so much pressed by the

Counsel for the petitioners, a very fair topic. The respondents relied much on the position filled by Mr. O'Hara, the only petitioner really directly interested in the result, alleging that he cannot complain of inconvenience or danger under the circumstances. Now, without doubt, he is to a certain extent a mere voluntary intervenient, his only rights flowing from his position as a purchaser of the reversion under the Incumbered Estates Commission, and the orders of that Court which sanction his taking these proceedings; but I must say that it seems to me a mere accident that the case is brought forward by a person filling such a character. Lord Mountcashell, while the estate was his, might have filed this petition; if he had declined to do so, without question any of the creditors of his estate might have said, this is a portion of our security, and we have a right to succeed to our debtors' rights, and to secure them for our own purposes. The creditors might have applied to this Court to have their demands realised, and to prevent the destruction of any portion of the property on which those demands were charged; and Mr. O'Hara, purchasing from the Incumbered Estates Court, is in a certain sense clothed with the rights of those creditors, for the satisfaction of whose demands the estate was sold; I do not, therefore, as against Mr. O'Hara, attribute any weight to the position occupied by him.

The real question is one in which I do not in any way dissent from the Master of the Rolls in his view of the general principle; so the only doubt is, whether this is a case for the exercise of the discretionary power of this Court—how far it may be a wise exercise of that power to interfere under these circumstances? There is no reported decision where, pending proceedings in a Court of Law, which had not arrived at their ultimate decision, an injunction was dissolved, the Court declaring that they had reached a term beyond which it would not help the party unsuccessful at law. We must then consider what the real object of the action at law was—we must remember that it was really meant to assist this Court, which is unwilling to act upon its own judgment, where the question relates to some legal rights, until the party has established those rights in a Court of Law;

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*Judgment.*

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*Chancery.*  
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and the party having obtained the decision of a Court of Law in his favour is then in a position to come here and require the aid of this Court to enforce such decision. Then comes the question, when the case has been sent to a Court of Law, in what stage of the action can it be said that the right is established? No one would ever think of saying that the fact of having obtained a mere verdict would have entitled Lord O'Neill to move to dissolve the injunction, and to consider his right as finally established. We all know that a mere verdict is liable to be displaced by a new trial motion, and that practically it may be considered but a step in the cause, which this Court would be fully at liberty to consider, as not of itself alone, establishing the right before the proper time when it would no longer be open to dispute at law. Then is a new trial motion the only proceeding which this Court would regard? Surely not; if exceptions were taken, it would wait the discussion of such exceptions, or if there were a special verdict, it would give time for the argument of such verdict. Then, when there is judgment on the exceptions or special verdict, what is the next step which may be taken? A writ of error. It is difficult to say that the litigation has reached an end at a stage when the parties still think they may succeed in varying the decision, and have it open to them to proceed in the cause with that object. I cannot find any binding authority in such a case, and, unless coerced by authority, I do not think I can consider it conclusive that there has been a decision, even though in a Court of Error; where such decision is still subject to be revised, and proceedings to revise it are actually and *bona fide* pending. I merely say that it is not to be deemed conclusive; for, of course, it must always weigh much with the mind of the Court. It comes back therefore to the question, what is the inconvenience and what the danger to the parties which may occur, in whichever way the decision may be made? And we must remember that this is one of those cases where, if an erroneous decision be made in one way, the whole subject of claim may be gone when the right is ultimately established; whereas if, in the other, the party is left in no worse position than he was; in

other words, the Court is called on to prevent the occurrence of irremediable injury. If the injunction be dissolved, this timber may be swept away from the control of both parties, and then the petitioner, if he succeed in establishing his claim, may be left to his remedy against Lord O'Neill himself, or in the natural course of events, to his remedy against the respondent's estate, of the amount of which I know nothing; but be it what it may, a Court of Equity interferes by way of injunction, because it does not deem mere damages a full equivalent for the possession of the property itself. Then it is said, so far as the parties are personally concerned, Mr. O'Hara is no danger, that the danger seems rather to the estate of Lord Mountcashell; and that this is the fund endangered if the decision be in favour of Lord O'Neill. It is said that in that case, Mr. O'Hara will certainly obtain compensation out of the fund retained by him in his own hands, or if that be not sufficient, out of the fund in Court. But if it be decided that Lord O'Neill has no right to this timber—that his claim to it is utterly baseless, and if, pending the litigation, he be permitted to cut it down and carry it away; it may be a question what compensation Mr. O'Hara could in that case claim, that came from the Incumbered Estates Court? It is, on the contrary, plain that he could not be permitted to repudiate his purchase, or to demand compensation upon the ground that after the sale to him was complete, a portion of the property sold to him was wrongfully removed; so far therefore as Mr. O'Hara is concerned, I think he has made out a sufficient case of irreparable injury to entitle him to call for the aid of the Court.

Then other considerations have been suggested in the argument. It has been said that Lord O'Neill has been prevented by this injunction from doing that which, for the benefit of all parties, he ought to be permitted to do. That in a due course of husbandry he is entitled to cut this timber, and that it has suffered and been deteriorated in value for want of due and proper thinning. That certainly is a matter for consideration; but in considering it, I must ask whether the Court is really responsible for any injury inflicted by the neglect of thinning? The respondent might very fairly have suggested to the Court some

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*Judgment.*

course of action for the care of the timber—some arrangement by which, notwithstanding the injunction, he might have been permitted to adopt such measures as were necessary to preserve its value; and without doubt, any reasonable proposition of the kind would have been sanctioned. Many orders may be found defining the limits within which such management will be permitted. In the form of such an order there would not be any difficulty, nor would any be felt in restraining the party within those limits, either by attachment or by depriving him of the privilege. But the respondent has not applied for or obtained such an order; therefore if any mischief of the kind suggested has been inflicted on him, he has brought it entirely on himself. The Court is still open to an application for such an order, and it therefore appears to me that no substantial injury has been done to Lord O'Neill in that respect.

A difficulty, which seemed to me much more serious, was that founded on the 9th section of the Timber Registry Act, 23 & 24 G. 3, which, in the event of the death of Lord O'Neill, would give his executor twelve months only to enter, cut down and carry away the timber; it might therefore possibly occur that before the ultimate decision on the writ of error, the time would have expired; but that difficulty is met by the statement that the petitioner is willing that the twelve months should begin to run only from the final order in the cause; that arrangement, of course, to be reciprocal as to the six months given to the reversioner for compulsory purchase, by the 10th section of the same Act. The case then is, that irreparable injury may be done to the one side, if the order be not made, that the other side will not sustain any serious loss if it be; and the only question then remaining is whether, there being no authority upon the question, the mere fact of a decision liable to the possibility of a reversal, and which is at present the subject of proceedings to procure its reversal, is to have the effect of preventing this Court from exercising a discretion in respect to continuing or dissolving the injunction, whether we must wholly disregard the opinion in favour of the petitioner expressed by the Lord Chief Justice, as well as the fact

that a writ of error is now pending and prosecuted with diligence? It seems to me, as I said, a mere question of the balance of convenience with reference to the parties; and I cannot collect from the decisions that under such circumstances the Court is bound to tie up its own hands, as the defendant's Counsel contended, and to regard the decision of the Exchequer Chamber as final. If this question be distinguished from the cases in which a Court of Equity suspends the execution of its own decrees, the only cases bearing very distinctly on it are *Hope v. Hope* (a) and *Smith v. Effingham* (b). Neither of those decisions touches the precise point of the case here; but it is contended that they both contain certain general expressions, which show that the Court will examine the proceedings in a Court of Law, so far as to consider whether they are to be deemed final. In *Hope v. Hope*, leave had been given to bring an action, and a verdict for the plaintiff at law had been obtained. The defendants had miscarried in their attempt to get rid of the verdict, and were defeated by the course of the Court in which the action had been brought. There had been there a motion for a new trial, and a rule *nisi* granted, on the ground that the verdict was against evidence; but no bill of exceptions had been taken prior to the discussion of the conditional order; the rule *nisi* could not be supported on the ground on which it was obtained, and the Court of Law refused to permit it to be sustained on the question of law made in the case. The unsuccessful parties, when the case came on for further directions, were anxious to have a further trial of the questions, and eventually obtained it; but in the observations made by the Master of the Rolls, he says:—"Here Adrian Hope had every legal defence open to him on the trial; and if any error or irregularity took place, he might have tendered a bill of exceptions, or have moved for a new trial on those grounds." That is, that the party unsuccessful at law might have taken such steps, and that the Court of Equity would not have deemed such proceedings of no value, but would have taken them into consideration, and have acted upon them. When the Master of the Rolls said they might have tendered a bill of exceptions, it is to be presumed that if

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(a) 10 Beav. 581.

(b) Ibid, 589.

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they had done so, the Court would have considered the suit still pending, for the purpose of determining with whom the legal right rested. The judgment then proceeds, "But if he neglected to do so, and thus lost the opportunity at law, I cannot take upon myself to consider the regularity of the legal proceedings, upon the consideration of the equity reserved. Lord Eldon said :—' That if this Court thinks proper to consider the case upon record as fit to be governed by the result of a trial, the review or propriety of which belongs to a Court of Law, the opinion of a Court of Law is sought in such a form that it is regarded as conclusive, whether the judgment is obtained upon a verdict or in any other shape.' Such a shape may be obtained by the proceedings on a special verdict." These observations seem to imply that the Court will regard proceedings at law, to see how far they are conclusive; and I cannot consider that they have reached that final decision while they are *in transitu* to the House of Lords. Under these circumstances, although I do not differ from the Master of the Rolls, with respect to the principle which governs the case, I consider that the order can be so framed as to prevent any injury being received by Lord O'Neill, by imposing on the petitioner conditions requiring him to proceed with due diligence, and by reserving a right to Lord O'Neill to apply for powers of thinning and management, and that this is the safest mode of dealing with the application. The case is one of great novelty; but as it is so, I prefer proceeding on what seems to me the course affording most security to both parties, without leaving the petitioner to incur the danger of the whole subject of dispute being wrongfully swept away by the respondent, and only afterwards obtaining a full recognition of his right when he may possibly be without adequate means of securing any redress.

*Gen. Hearing Book, 12, f. 164.*

1854.  
*Chancery.*

ROSSBOROUGH v. BOYSE.

June 10, 13,  
19.

THE plaintiffs in this case moved, by way of appeal from an order made by his Honour the Master of the Rolls, that, in pursuance of the decree in the first cause, the defendant Jane Stratford Boyse might, within two days, pay to the said plaintiffs or to their attorney, lawfully authorised, the sum of £21,961. 19s. 10d., being the amount found to be due to the plaintiffs by the report of Edward Litton, Esq., the Master in these causes, bearing date the 8th day of April 1854, and payable to them under the decree in the first cause, bearing date the 19th day of April 1853.

The object of the motion was to obtain an order directing the payment of a sum of money, which could be exemplified, in pursuance of the 41 G. 3, c. 90, s. 6, and thereby enforced personally against Mrs. Boyse the defendant, who appeared to be resident in England.

The facts of the case and the arguments of Counsel are fully stated in the report of the motion at the Rolls, *ante*, p. 540.

Mr. *F. Fitzgerald* and Mr. *David Lynch*, for the plaintiffs.

The *Attorney-General* and Mr. *Lawson*, for the defendants.

The LORD CHANCELLOR.

This case comes before me by way of appeal from the decision of the Master of the Rolls, refusing to make an order pursuant to the terms of the notice of motion of the plaintiffs. The suit terminated in this Court with a decree which directed that an account should be taken against Mr. and Mrs. Boyse, of the amount of the rents of the estate received by them or either of them for six years before the filing of the bill; and that the

B, the wife of A, claimed certain lands, as devisee under a will, which the decree in a suit instituted by the heir against A and B declared to be null and void. The decree further directed an account of all sums received by A and B, or either of them, on account of the said lands, and ordered the defendants to pay the sum to be found due on taking such account. A died before the Master's report was made up. The suit was revived against his personal representative. The Master found the sum received by A and B. *Held*, that B was personally responsible for the entire amount by the Master's report found to be due.

A decree, directing a husband and wife to pay a sum of money

in respect of the rents and profits of lands received by the wife, or by the husband, in her right, may be enforced against the wife after the husband's death.

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amount to be found due should be paid within a time limited by the decree. After the pronouncing of that decree Mr. Boyse died, and the cause was revived in due form against his personal representative, not seeking against that representative any particular relief or further account. What was the further course of proceeding in this case? Mrs. Boyse appeared by Counsel in the office, and took steps to assert her own rights individually. She took some objections to the rulings of the Master in reference to the account, which were not, however, turned into exceptions; and the result was the ascertainment by the Master of a very large sum being due to the plaintiffs. The correctness of that account is not now disputed.

That being the case, I apprehend that nothing further remained to be done, for the purpose of enforcing that decree of the Court, than obtaining such process as would give effect to it, and all the rights the plaintiffs can acquire by such a decree were then complete; for when the sum was ascertained by the Master, that was the amount to which they were entitled, and it was not necessary to ask for any further order, or for that purpose to come back to this Court. In an ordinary case there would have been no more to be done than there would have been in any ordinary suit in which the decree directed the payment of costs, after they had been taxed and ascertained, for the enforcement of that decree. It turns out, however, that during the reference directed by this Court, the defendant Mrs. Boyse went to reside in England, and that, therefore, she was not personally amenable to the process of the Court; and the parties being desirous of enforcing the decree against her, they are anxious to make it operative in England, under the provisions of the 41 G. 3, c. 90, s. 6, which enacts:—"That in all cases where, in any suit between party and party, any decree shall be pronounced, or any order made for payment of or for accounting for money by the High Court of Chancery in that part of the United Kingdom called Ireland, the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal of Ireland for the time being respectively shall, upon application made to him or them respec-

tively, cause a copy of such order or decree to be exemplified, and certified to the Court of Chancery in that part of the United Kingdom called England, under the great seal of Ireland; and the Lord Chancellor, &c., for the custody of the great seal of England, shall forthwith cause such order or decree, when it shall be presented to them respectively so exemplified, to be enrolled in the rolls of the High Court of Chancery in England, and shall cause process of attachment and committal to issue against the person of the party against whom such order or decree shall have been made respectively, in order to enforce obedience and performance of the same, as fully and effectually to all intents and purposes as if such order or decree had been originally pronounced in the said Court of Chancery in England; and it shall be lawful to and for the Lord Chancellor, &c., of England for the time being, from time to time to make orders upon petition, as the occasion may require, for payment of money levied under such process as aforesaid, into the Bank of England, with the privity of the Accountant-General of said Court, to the credit and for the benefit of the party who shall have obtained such order or decree." The cause of the present application is that the plaintiffs apprehend that unless a sum be specified in the order of this Court, they cannot obtain the benefit of this Act; and they, therefore, desire to have an order that this ascertained sum be paid within a given time—the effect of which would be to bring the case directly within the terms of the Act, and thus enable them to have the order at once enforced.

In an ordinray case, if a decree be made by which the defendant is required to pay the sum which shall be due from him on taking an account, it seems to me that it would be quite a matter of course to make such an order without notice to the party, and I cannot understand that there would be any more difficulty, according to the practice of this Court, in making such a short order, than there would be in making an order in the case of a decree which it is sought to register under the provisions of another Act of Parliament, where also such a short order is necessary. Such orders have been made as well in interlocutory as in final proceedings; and I very well remember that it was the usual course in the Exchequer

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—  
*Judgment.*

to make an order for payment, for the purpose of registration under the provisions of the Act of Parliament, as well as to issue execution thereon.

To my mind, it would be perfectly a matter of course in an ordinary case to make the order asked for by the plaintiffs, even without notice to any one, as a mere mode of carrying out and executing the decree of the Court, and I cannot understand what cause could be shown against such a course of proceeding. In this case, supposing the death of Mr. Boyse not to have taken place, it would have been, therefore, a matter of course to issue process to enforce payment of the sum found due by the report; but it is contended that as he has died, this Court either cannot or should not enforce this decree personally against Mrs. Boyse. Whatever may have been the course pursued elsewhere, it was conceded in the discussion here that this must be considered a binding decree, although there is an appeal pending to the House of Lords, and I do not see how the antecedents of this case can be discussed on the present motion. The decree has been enrolled—it is not within the power of the Court to vary it; and, being a valid decree, the plaintiffs are entitled to enforce it against the person bound by that decree. The difficulty in my mind is, not to find reasons to justify the granting of the application, but to discover any ground upon which I could refuse it. That Mrs. Boyse is bound, is not, I believe, denied: here, then, is a decree in a suit regularly instituted against this lady and her husband—a binding decree against her as well as her husband; and no one has suggested that this is a decree so palpably and clearly erroneous, as not to be binding on the parties—that it is one which the Court ought not, on account of such clear and palpable error, to enforce. The decree being against husband and wife—the former dies, she becomes a *feme sole*, and her liability survives. How far the Court would issue process against her during the lifetime of her husband, in order to enforce the decree, is a different question, and upon that it is not necessary to pronounce any opinion. The cases of *Hulme v. Tennant* (a), and *Francis v. Wigzel* (b), decide no more than this,

(a) 1 Bro., C.C., 16.

(b) 1 Mad. 528.

that during the coverture the Court will not, on a mere general liability, affect the separate estate of a married woman, and that is all the effect of those decisions; but to say that the Court will not make decrees against married women, is to contradict the whole practice of the Court; and in the case before Lord Lyndhurst, in *Purton Cooper's Reports*, he appears to have made an order against the wife for payment of the costs, without any difficulty or hesitation whatever.

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At law there is no imaginable difficulty in bringing an action against husband and wife, obtaining a verdict against both, and issuing execution against both, upon which the wife may be taken into custody, when it is a mere matter of discretion, regulated by the circumstance of her having or not having separate property, whether she shall obtain her discharge; and even upon the jurisdiction to discharge, where the wife has no property, doubt has been thrown. But the power and the duty of the Court in the first instance to issue execution is unquestioned; and in the present case I have the certificate of the officer of the Court, that where there was a decree against husband and wife, he would issue process against both without notice; and, as a matter of course, although he would not issue process against her if she survived her husband, without notice to her. As I said, then, the difficulty here is, not to find reasons for granting the application of the plaintiffs, but to discover what imaginable ground there is for refusing it.

It is said that what is sought for would be a judicial act of the Court; and if that were so, no doubt the cause ought to be set down for further directions; but it is not a judicial act, it is nothing more than issuing process to enforce the execution of the decree. The judicial act was completed and perfected during the lifetime of both parties; nothing remained to be done but to ascertain the precise sum, in order to enforce the liquidation of that sum in conformity with the directions in the decree, and every thing of a judicial character was consummated during the lifetime of the husband. This application is not with a view of introducing some new element into the decree of the Court, but the wife being bound by the decree, to make it operative

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for the benefit of the plaintiffs. Perhaps Mr. Boyse might have had some ground for complaining against that decree, which rendered him liable for rents received by Mrs. Boyse prior to the coverture; but as it was made in his lifetime, the question is closed as against his representatives, and it is taken out of that class of cases in which it is held that a husband's property cannot be answerable for the debt of the wife *dum sola*, unless recovered during his lifetime. It appears to me that there is no ground whatever for the objection, that what the Court is called upon to do is a judicial act, and that therefore the cause should be set down again.

It is then said that a demand for this money was not made under the general order, but that is for the Court in England. The demand ought to be made there in accordance with the English rules of practice, to lay the foundation for an attachment; and even if made here it would be nugatory, for the demand could not be exemplified. I see nothing, either in reason, justice or principle, to sustain the objections made by the defendant to the present application, and to this decree, which is as valid as any other decree of the Court.

*Keogh v. Cathcart* (a) was a wholly different case from this. It was the case of a suit instituted by the husband (the wife being joined as a petitioner) in his marital right, and in reference to her estate; he might, *de die in diem*, carry on such proceedings, and she could not prevent his doing so; and as I considered that in that case the suit could not be regarded as that of the wife, but as that of the husband, I refused to issue execution against the wife, or a sequestration for costs which were really due, and ought to have been paid by her husband, and which had been awarded against him. But the party in this case had the benefit of all the proceedings which were taken during the progress of the cause; and that is an answer to the doubts thrown out in the Court below, in reference to some questions which were discussed in the case of *Turner v. Turner* (b). In that case, which was a suit to establish against the heiress-at-law, who was a married woman, a will de-

(a) 12 Ir. Eq. Rep. 215.

(b) 2 De Gex, M'N. & G. 28.

vising freehold lands, the heiress and her husband joined in their answer, and an issue was directed upon the application of the wife. The husband afterwards compromised that suit improperly, and in consequence of his having done so, the Court held that the wife was not bound, and remitted her to the original position which she filled when seeking the issue. Lord Cranworth there says:—"If the wife, or the husband acting for the wife, does not claim an issue at the time the cause comes to a hearing, the wife is bound; still in this case an issue was directed, and then arises this question—, an issue having under these circumstances been directed, could the husband afterwards present a petition to vary that order, and to get rid of the issue? In my opinion he could not." But it is the wildest thing to say that there is an analogy between *Turner v. Turner* and this case, in which, after asking for an issue, and taking the chance of a verdict, and after the other subsequent proceedings, the wife now says she ought not to be bound after the death of her husband.

In the case of *Rigley v. Lee et ux.* (a), which was an action of *ejectione firmæ*, "after verdict for the plaintiff it was moved that the baron was dead since the *Nisi Prius*, and before the day in *Banco*, and whether the bill should abate in all or stand against the feme? And because it is in nature of an action of trespass, and the feme is charged for her own fact, it was adjudged that the action continued against the feme, and judgment should be entered against her sole, because the baron was dead." *Johns v. Adams* (b) was a very strong case. There was there a judgment against husband and wife, executrix *de bonis testatoris et si non*, &c., the damages *de bonis suis propriis*, and the husband being dead, it was objected that the judgment ought to have been *de bonis propriis* of the husband only; but the Court held the judgment to be well given; for, "although the feme had not any goods during the coverture, yet because the baron is charged only in respect of the feme, and she might have goods if she had survived, and execution might be taken against her; therefore, the judgment is good, and so are all the precedents."

(a) Cro. Jac. 356.

(b) Cro. Jac. 191.

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The principal case in which the doctrine is discussed is that of *Adair v. Shaw* (a), before Lord Redesdale; and that learned Judge had no doubt as to the propriety of proceeding against husband and wife, or of the liability of the wife surviving, and the right of the parties to go against both. The result of his judgment shows that he considered the proceedings perfectly regular, and binding on the wife. After dissenting from the *dictum* of Lord Thurlow, in *Beynon v. Gollins*, that the wife was not liable, he says:—"I have looked into the words attributed to Lord Thurlow in that case; I have looked into the cases mentioned as giving authority to that *dictum*, but I can find none to warrant it; on the contrary, it seems to me that all the cases clearly lay down, that though the waste during coverture is the act of the husband, yet it is an act for which the wife, after the determination of the coverture, is responsible, because, according to the language of the cases, it was her folly to take a husband that would so misconduct himself." Lord Redesdale cites the remarkable case of *Gilpin v. Smith* (b), where it was held, "that when a wife, after the death of her first husband, entered and took the profits (of lands settled for the payment of debts) and married again; and she and the second husband continued to take the profits, the third husband was bound to answer, not only for the profits received by himself and his wife when sole, but also for what was received by the second husband." In the argument in that case, Maynard says:—"Both in law and equity, Smith and his wife were answerable for the profits taken by the wife, and after by the second husband; as, if feme, tenant for life, marry, and the husband doth waste and dies, waste lies against the wife."

Whether the defendant Mrs. Boyse might have any right to go against the representatives of her husband, I do not stop to inquire; the plaintiffs have nothing to do with that question; the wife was as much a wrong-doer as the husband, and the plaintiffs have been kept out of the rents of their estate by the acts of both. No doubt, if a decree of this kind had never before been made, if I had any doubt of my power to make it, or of the validity of such a decree, it might

(a) 1 Sch. & Lef. 243.

(b) 1 Ch. Cas. 82.

be very proper to make an application to suspend its execution during the progress of the appeal to the House of Lords. The present question is, however, very different. It is, in fact, whether a decree of this Court remaining unreversed, and which is in my opinion perfectly correct, is to be treated as clearly erroneous against the wife. This is a subject settled by no mere modern decision; I find it treated as law so long since as the time of Henry the Sixth, when it was decided in an action of novel disseisin, that the taking of the profits by the husband in right of his wife was in law a taking by the wife. I refer to the *Year Book*, 39 Hen. 6, 44, 45. In that case, Laicon, Sergeant, in argument says:—"Si le baron et sa feme disseisent un home et Assise est post envers eux, et le plaintiff recover et le baron devy, execution serra fait envers la feme, des damages si bien come de principal." And Prisot, C.J., following up the argument, says:—"Si le baron et sa feme out un mesme occupation, et le baron devy, la feme serra charge per le Stat. de Gloucester, per le mesme occupation en la vie son baron en Assise ou per brief de transgressus."

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What is this case? A *feme sole* enters upon the property of the heiress-at-law; she commits in fact an abatement, afterwards marries, and puts the rents within the dominion of her husband; he dies, and she becomes a *feme sole*. It was her act, the taking of a husband; and why should she not answer for that which was her own act? It appears to me, as I have already remarked, that this decree cannot be disturbed, supposing the issue to have been well decided. On the whole case, I have no doubt that this order is a mere matter of form; that the decree is in form perfectly right, and that I cannot refuse to grant this motion; but the time of payment may be a matter of importance: two days appear to be too short a period.

The *Attorney-General* said that he meant to apply for a suspension of the order for payment, and that facts were stated in the affidavits before the Rolls as to the pecuniary position of the plaintiffs, which it did not become necessary to open fully, owing to the

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view which the Master of the Rolls took of the case. Notice of an application to stay proceedings would be served for Saturday.

The LORD CHANCELLOR.

I will make the order for payment within a fortnight.

*Gen. Hearing Book, 12, fol. 212, 217, 280.*

### THE QUEEN v. IRWIN.

1854.  
 April 29.

(*Petty-Bag Side.*)

*Awrit of sci. fa.* on a recognizance recited the recognizance, which purported to be taken by a Master Extraordinary of the Court, for the county of R. The writ further alleged that S. was a Master Extraordinary of the Court for the county of R. The plea traversed the allegation that S. was a Master Extraordinary for the county of R.—*Held*, on demurrer, that the plea was bad, as the recital of the recognizance estopped the defendant from denying any of the material facts appearing therefrom, though afterwards substantially alleged.

THIS case came before the Court upon demurrer to a plea to a *scire facias*, to revive the following recognizance:—"Be it remembered, that on the 30th day of October, in the year of our Lord God 1848, and in the twelfth year of the reign of our Sovereign Lady Victoria, &c., John Kelly, of Woodmount, and John Irwin, of Lebig, in the county of Roscommon, Esqrs., and the Rev. John French, of Ratragh, in the said county of Roscommon, clerk, came before Edward Stanford, Esq., a Master Extraordinary for the said county of Roscommon, at French Park, in the said county of Roscommon, and then and there jointly and severally acknowledged themselves to be indebted to our said Lady the Queen, in the sum of £4000 sterling, good and lawful money of Great Britain, to be paid to our said Lady the Queen, her heirs and successors; which, if they neglect to pay, they will and agree that the said sum of £4000 be levied and recovered off and from them and every of them, their and every of their heirs, executors and administrators, their and every of their manors, messuages, lands, tenements and hereditaments, goods and chattels, wheresoever they shall be found within or in Ireland, to the sole and proper use of the said Lady the Queen, her heirs and successors."

The *scire facias* recited the above recognizance, and referred to it in the usual terms, "as by the said recognizance of record, and

enrolled in our said Court of Chancery in Ireland, on the 3rd day of November 1848, may appear." It then proceeded:—"and which said recognizance was duly taken and acknowledged on the 30th day of October, in the year of our Lord 1848, at French Park aforesaid, in the county of Roscommon, by the said John Kelly, John Irwin and the Rev. John French, before the said Edward Stanford, who then and there was a Master Extraordinary of our said Court of Chancery in Ireland, in and for the county of Roscommon; and then and there in that behalf duly authorised."

The *scire facias* then proceeded in the usual form against Daniel Irwin, the heir and the terretenants of John Irwin.

The second plea of Daniel Irwin was:—"And for a further plea in this behalf, the said Daniel Irwin, by leave of the Attorney-General of our said Lady the Queen, for that purpose first had and obtained, says that our said Lady the Queen ought not to have execution for the said sum of £4000 in the writ of *scire facias* mentioned, or for any part thereof, to be levied off the said manors, messuages, lands, tenements and hereditaments, in the return to the said writ of *scire facias* mentioned, whereof he the said Daniel Irwin is seised as heir-at-law of the said John Irwin, according to the form and effect of the recognizance aforesaid, because he says—that the said Edward Stanford in the recognizance and writ of *scire facias* mentioned was not, at the time of the taking and acknowledgment of the said recognizance, a Master Extraordinary of the High Court of Chancery in Ireland, in and for the said county of Roscommon, and duly authorised in that behalf, in manner and form as in the said writ of *scire facias* above alleged; and of this he puts himself upon the country, and so forth." Demurrer to second plea, alleging for causes, that "it traverses and attempts to put in issue to be tried by the country matter which the said Daniel Irwin is estopped from denying by the record of the said recognizance, and which said record is stated in the writ of *scire facias* in this suit; and for that the said last mentioned plea traverses what is matter of record, and stated so to be in the said writ of *scire facias*, and yet does not deny the existence of such record; and for that the

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said last mentioned plea, if the same be taken as a traverse, not of the record of the said recognizance, as stated in the said writ of *scire facias*, but of any substantive averment in the said writ, traverses what is matter of surplusage only; and for that the traverse taken by the said last mentioned plea is too large, inasmuch as it includes what is matter of record, and stated so to be in the said writ, and yet does not deny the existence of such record; and for that the traverse taken by the said last mentioned plea is too large, inasmuch as it includes matter which the said Daniel Irwin is estopped from denying by the record of the said recognizance, and which said record is stated in the said writ of *scire facias*," and various others.

Mr. *James Farrel* (with him Mr. *Napier*), for the demurrer, was stopped by the Court.

The *Attorney-General* (with him Mr. *Beytagh*), contra, contended that the substantive allegation of the fact of Mr. Stanford being a Master of the Court was material, and that it was not pleaded by way of estoppel, although it also appeared in the statement of the recognizance.

The LORD CHANCELLOR.

I must allow this demurrer, with costs.

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*See* STOP ORDER.

## ACCUMULATION.

A testator devised certain lands of Q., in trust, as soon as conveniently might be after his decease, to sell and dispose of the said lands, and that the money arising from the sale, together with the rents and profits of the said lands, until the same should be sold, should be considered as part of his personal estate, and should be applied and disposed of in the same manner as his personal estate. He gave his personal estate to trustees, upon trust, to pay his funeral expenses, debts and certain legacies, and in the next place, that the yearly amount of his personal estate, thereby directed to be laid out in the purchase of lands, and the yearly rents and profits of the lands which should be purchased with such personal estate, or any part thereof, should be applied for the payment of his debts and legacies, until the same should be paid off and satisfied; and as to the residue of his personal estate, upon trust, to lay out the same in purchasing lands of inheritance in fee-simple, to be conveyed and assured to his grandson A. T. and his heirs, subject to a charge for renewing certain chattel leases, and he directed a term for years to be created of such purchased lands for that purpose; and

upon trust, that until a proper purchase could be had, the trust-money should be laid out at interest, and be applied towards discharging the purchase; and he directed his trustees to renew his chattel leases, which he bequeathed to A. T. for life. The testator died in 1771, and from that to 1837, A. T. continued in possession of the lands of Q. and the chattel leases. From 1820 to 1837, he paid large sums for renewal fines. *Held*, that the accumulation of the rents of the lands of Q. was to cease at the end of a year from the testator's death, and that the rents from that period to 1820, when the trust to raise the renewal fines arose, belonged to A. T.; but that subsequently to 1820, the rents were to be set off against the renewal fines. *C. Smith v. Lord Dungannon* 316

## ACKNOWLEDGMENT.

An acknowledgment of a judgment debt in the will of the debtor is sufficient to take it out of the operation of the Statute of Limitations (3 & 4 W. 4, c. 27, s. 40). *C. Millington v. Thompson* 236

## ACTION AT LAW.

*See* INJUNCTION, 1, 2, 3, 4.

## ADMINISTRATION SUIT.

*See* COSTS, 2, 3, 5.

## EXECUTOR.

The Court will not decide, on the first hearing of a cause petition for an administration, that the extra costs caused by setting it down as a general cause petition, instead of for a summary reference, should be paid

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by the petitioner. *C. Green v. Giles* 487

ADMINISTRATOR.  
See EXECUTOR, 1.

## AFFIDAVIT.

1. A motion to vary a Master's report was directed to stand over for further affidavits. *Held*, that a party who had filed an affidavit could not, on appeal from the order made on the further affidavits, object to the admission of them as irregular and contrary to the practice of the Court. *C. Stewart v. The Marquis of Conyngham* 104
2. "In strictness the petitioner is not entitled to use an affidavit before this Court, on the appeal, which was not before the Master; but as it would lead to expense to send the case back to the Master to consider the new evidence, it will be better for me to dispose of the case so far as it can be satisfactorily disposed of at present." *Per SMITH, M. R. Herbert v. Greene* 277-8
3. The affidavits on which an application for a writ of prohibition is grounded ought to be entitled simply in the Court to which application is made. *C. Rich v. Anderson* 463

## AGENT.

The defendant had acted gratuitously as the agent of the plaintiff, transmitting to her the interest of charges to which she was entitled. One of the charges was paid to the defendant, which the plaintiff directed him to invest on a specified real security, which he was unable to do; but which, without her authority, he lent to L., for whom he was also agent, and who was indebted to him, on the security of a bond and warrant of attorney to enter judgment. He inclosed the bond and warrant to her in a letter, in which he stated, contrary to the fact, that the money had been applied to pay off a charge on his estate. L. afterwards, on his son's marriage,

conveyed a part of the estate in trust to pay off charges on his estate, another part to the use of his son and his issue; and the lands of C., in trust, to secure his debt to the defendant. The defendant, in several letters, offered to give the plaintiff's claim priority over his demand on the lands of C. L. being dead, leaving no assets to pay the plaintiff's claim, the Court, on a bill filed by her, declared the plaintiff entitled to a specific performance of the contract contained in the letters, and that the defendant was a trustee for the plaintiff, as to so much of his security on the lands of C. as would be sufficient to pay her claim; and ordered that he should execute a deed declaring the trust. *C. O'Beirne v. Cornwall* 130

## AGREEMENT.

1. A Railway Company served a notice to treat for the purchase of land; and persons in their employment, who either were, or acted as if they were, authorised to arrange on the price, obtained the vendor's signature to a printed form of agreement, fixing the sum. *Held*, that the Company were bound to specifically perform this agreement, though not signed by them under their corporate seal.
2. *Semble*.—An award made after the date of said agreement, and under the vendor's protest, by the arbitrator appointed pursuant to 14 & 15 Vic., c. 70, was a nullity.
3. *Semble*.—Had the price to be paid for the land been ascertained by parol only, after service of the notice to treat, the contract would still have been binding. *C. Smith v. Dublin and Bray Railway Co.* 225
4. "It is true, that a corporation cannot, in general, contract otherwise than under seal; but it may be authorised to do so by the object, scope or terms of the Act of Parliament under which it is incorporated. An exception to the general principle also prevails, whenever to hold the rule applicable

## ANNUITY.

would occasion great inconvenience, or tend to defeat the object for which the corporation was created. Thus, the performance of acts that are of very frequent occurrence, or of too general or insignificant a nature to compensate for the trouble of affixing the common seal, are established exceptions."—*Per* BRADY, L. C. *Smith v. Dublin and Bray Railway Co.*

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## ANNUITY.

*See* CHARITABLE BEQUEST.  
MORTGAGE, 1.  
PRIORITY, 1.

## ANTICIPATION.

*See* MARRIED WOMAN.

## APPEAL.

*See* AFFIDAVIT, 1, 2.  
WRIT OF ERROR.

1. "A question has, I believe, arisen as to whether there can be an appeal to the House of Lords against the decision of the Court in cases under the Renewable Leasehold Conversion Act, or from the decision of the Lord Chancellor on appeal? I apprehend it will be found that an appeal lies to the House of Lords in all cases where jurisdiction is given to the *Court of Chancery*. The 22nd section of the Renewable Leasehold Conversion Act gives such jurisdiction. If authority is given to the Lord Chancellor alone by statute, some question would arise as to the right of appeal to the House of Lords; but I apprehend, where jurisdiction is given to the Court of Chancery, such jurisdiction is given subject, impliedly, to the right to appeal. The principal case on the subject is *Bigbold v. Springfield*; and although the point was not decided in that case, it will, I think, be found that the opinion which Lord Brougham threw out is correct, and that on the grounds stated by Mr. Knight Bruce, who argued the question for the appellants, an appeal will lie. The observations of Lord Lang-

## APPOINTMENT.

643

dale, in the important case of *The Grand Junction Canal Company v. Dimes*, are important on this point."

—*Per* SMITH, M. R. *Ex parte Knox* 53

2. "In strictness, the petitioner is not entitled to use an affidavit before this Court, on the appeal, which was not before the Master; but as it would lead to expense to send the case back to the Master to consider the new evidence, it will be better for me to dispose of the case, so far as it can be satisfactorily disposed of at present."—*Per* SMITH, M. R. *Herbert v. Greene* 277-8

## APPOINTMENT.

*See* ASSETS.  
PORTIONS, 1.  
POWER.

1. The statute as to illusory appointments (1 *W.* 4, c. 46) made the appointment of a nominal or illusory share, which was a valid appointment at law, valid in equity, but it did not make that which was an invalid appointment, both at law and in equity, because some of the objects of the power were excluded, valid in equity. *R. Minchin v. Minchin* 167

Therefore an appointment—under a power which does not warrant the exclusion of any of the objects of it—to some of them, and if they should die under age, and without issue, to the others, is invalid. *Ibid.*

2. "The recital in the statute shows what the law was; and it is clear that when the power does not authorise an exclusive appointment, a share, however small, must be appointed to each child."—*Per* SMITH, M. R. *Id.* 177
3. A fund was, by a marriage settlement, directed to be divided among children, as the husband and wife, or survivor of them, should, by any deed or writing, or by his or her last will and testament, limit and appoint. The wife made an appointment by

her will, which was written by the husband himself, and proved by him after her death. *Held*—That the will was inoperative, either as a joint appointment, or an appointment by the survivor. *Ibid*

4. A father, having a power of appointment over property, consisting of money and land, in favour of his two children, A and B, by deed poll, reciting—that £1000 had been paid to A, as a marriage portion out of the trust fund, and that it was intended as her share of the trust fund, and a satisfaction of her claim thereon, appointed and declared that the said sum of £1000, part of said trust fund, should be the full share of A; and he appointed the remainder of the property to B. By a deed, executed five days afterwards, reciting a mortgage by the father, of property not the subject of the power, to secure a portion of the trust fund lent to him; and that the father was indebted in another sum of £200, and that he had agreed to convey his equity of redemption, in consideration of B, the son, securing an annuity to his mother, and charging the equity of redemption with a debt of £200: the father conveyed the equity of redemption to B, and B charged it, and the trust property which had been appointed to him, with an annuity for his mother, and with the debt of £200.—*Held*, in the absence of evidence of the value of the equity of redemption, that the appointment could not be impeached by A, as against a purchaser without notice from B. C. *Mills v. Spear* 304

#### APPROPRIATION.

1. A testator, by his will, dated in 1798, gave to his wife the sum of £1500, which he was possessed of by the death of his mother, and which he became entitled to under the marriage settlement of his father. By a codicil, in 1800, after stating that his brother E. had married and had children, he willed that after the death

of his wife, the children of his two brothers E. and F. (should F. marry and have issue) "should have the sum of £1687, which he got by the death of his mother, and that was charged on the estate of A, in such proportions as his wife should will it." At the date of the codicil, the £1687, which was the same sum as that left by the will, was lent on a judgment against A. It was paid off in 1803, and invested by the testator in  $\frac{1}{2}$  per cent. stock.

After the testator's death in 1803, his widow and executrix wrote a letter to E., inclosing a copy of the will, and in which she stated that the stock in which the money had been invested should ever be held sacred by her for E.'s children, and if it did not increase, it should never diminish. In 1816, an injunction was obtained by the children of E., then minors, to restrain the sale of the stock by the widow, under a misapprehension that she was about to sell it. E.'s children came of age at different times between 1820 and 1838, and the stock remained untouched until 1853, when the widow died. *Held*, that the letter amounted to an appropriation of the stock to the legacy by the executrix, which, under the circumstances, must be presumed to have been assented to by the children of E. as they came of age. R. *Thomas v. Thomas* 399

2. "There may be an appropriation of a sum in stock for the payment of a legacy either by the Court of Chancery or *in pais*. If the legatees are under disability, an appropriation must, it has been contended, be by the Court, or it will not be binding. If, however, the parties are not under disability, it is, I apprehend, clear, that there may be an appropriation *in pais*, with the consent of the executor and the legatees." *Per SMITH, M. R.* *Id.* 412-13

#### ARREST.

A respondent is not entitled to his

discharge from custody under a *ne exeat regno*, upon the ground that he was made amenable to that writ by means of an arrest under a warrant issued on informations sworn by the petitioner, in respect of the same matters which were in question in the suit; even though the prosecution instituted in pursuance of those informations be eventually abandoned, if the petitioner appear to have had a *bona fide* intention of prosecuting the criminal proceedings at the time of procuring the arrest on the warrant. C. *Kelly v. Birch* 466

## ASSETS.

See EXECUTOR.

A fund was bequeathed in trust for the separate use of A for life, and that she should be at liberty to dispose of it by her last will and testament, provided the power should not be exercised in favour of B. A, having survived her husband, made a will appointing the fund. *Held*, that the appointees were trustees for creditors of A, and the fund assets for payment of his debts. R. *Edie v. Babington* 568

The rule that where a general power of appointment is exercised in favour of a volunteer, he is a trustee for the creditors of the appointee, holds, where the power is to be exercised by will only. *Ibid.*

## AWARD.

See AGREEMENT, 2.  
RAILWAY COMPANY.

## BANKERS' ACTS.

See CROWN.

RECOGNIZANCE, 3.

## BANKRUPTCY.

1. In order to constitute a fraudulent preference, it is not sufficient that a payment or security was voluntary, and made at a time when the trader was in insolvent circumstances. It is necessary to show that it was made

in contemplation of bankruptcy. Bkt. Ct. *In re Ryan* 33

2. After a judgment debtor has become bankrupt, a receiver cannot be appointed on petition of the judgment creditor, though cause is shown only by a puisne mortgagee in possession. C. *Ryan v. Lefroy* 351

3. Shares in a Railway Company were standing in the name of a bankrupt at the time of his bankruptcy, on the 13th of November 1847. A large sum was then due on the shares for calls, which the Company proved for in the bankruptcy in July 1849, and received a dividend, the assignees not requiring the shares to be brought in, and the secretary of the Company expressly stating that they had no security for the calls. Subsequent calls were made, the shares still remaining in the bankrupt's name. In July 1852, the Company served a notice on the bankrupt, that the shares would be forfeited, and accordingly the shares were declared forfeited, at a meeting of the directors. In May 1853, the assignees tendered the amount of the calls which fell due after the fiat. *Held*, on a petition filed by the assignees against the Company, that the assignees might, when the Company proved for the calls, have had the transmission of the shares authenticated to them under the 8th Vic., c. 16, s. 18 (Companies Clauses Consolidation Act, 1845), and have had them sold for the benefit of the bankrupt's estate. C. *Turner v. The Dublin and Belfast Junction Railway Company* 526

4. But that the assignees not having then accepted the shares, they continued the property of the bankrupt, and had been forfeited for non-payment of the calls. *Ibid.*

5. *Semble*.—The proof under the bankruptcy was not equivalent to payment of the calls, so as to satisfy the provisions of the statute, which makes the payment of the calls a condition precedent to the right to transfer the shares. *Ibid.*

**BARON AND FEME.**  
*See* HUSBAND AND WIFE.

**BONUS.**  
*See* INSURANCE.

**CALLS.**  
*See* RAILWAY SHARES.

**CANAL CARRIERS' ACT.**

The Royal Canal and the Grand Canal run parallel to each other for a short distance, and then diverge and fall into the River Shannon, at some distance from each other.

*Held*, that as they communicate with each other by water, they are within the Canal Carriers' Act, so as to enable the Grand Canal Company, under that Act, to make a lease of their tolls and duties to the M. G. W. Railway Company, who had become proprietors of the Royal Canal. *C. McDonnell v. The Grand Canal Company* 578

**CASES APPROVED OF**

<i>Crone v. O'Dell</i> (1 B. & B. 459)	120
<i>White v. Barber</i> (5 Bing.)	209
<i>Dunne v. Doran</i> (13 Ir. Eq. Rep.)	361
<i>Jackson v. Jackson</i> (5 Ir. Eq. Rep.)	591
<i>Jameson v. Farrer</i> (3 Ir. Eq. Rep.)	513

**CASES OBSERVED ON.**

<i>Toulmin v. Steere</i> (3 Mer. 210)	13
<i>Blacket v. Lamb</i> (16 Jur. 14)	31
<i>Carver v. Bowles</i> (2 Russ. & M. 304)	32

**CHANCERY REGULATION ACT.**

*See* ADMINISTRATION SUIT.  
**COSTS, 5.**

1. An order cannot be made in a cause petition against a minor, without proofs. *C. Holmes v. Holmes* 126
2. "I entertain great doubt whether the petition in this case falls within the 15th section of the statute. If it does not, the Master had no jurisdiction to decide the case. However, as the Lord Chancellor held that the case did fall within the 15th section, and

**CHARGING ORDER.**

referred the matter of the petition to the Master, by the order of the 15th of July 1852, that question was not open in the Master's office, nor is it open to me to consider or decide. The facts all appeared on the face of the petition, and the order of reference by the Lord Chancellor is of course to be considered as a decision that the case fell within the 15th section."—*Per SMITH, M. R. Minchin v. Minchin* 175

3. "In strictness the petitioner is not entitled to use an affidavit before this Court on the appeal, which was not before the Master, but as it would lead to expense to send the case back to the Master to consider the new evidence, it will be better for me to dispose of the case, so far as it can be satisfactorily disposed of at present." *Per SMITH, M. R. Herbert v. Greene* 277-8
4. Serious questions of fact cannot be satisfactorily determined by the Court in a proceeding by cause petition, without directing an issue. *C. Kelly v. Birch* 478
5. The summary order on petitions, presented as within the 15th section of the Chancery Regulation Act, merely decides that the subject-matter of the suit is within that section. *C. Graham v. M'Dermott* 488
6. The Court has not power to order service out of the jurisdiction of the notice of a suggestion to revive a suit. *C. Rossborough v. Boyse* 489

**CHARGING ORDER.**

*See* DEED, 3.

1. An equitable mortgagee, by deposit of Railway shares, is entitled to priority over a prior judgment creditor of the mortgagor, who has obtained an order charging the shares, under the 3 & 4 Vic., c. 105, s. 23, subsequently to the mortgage. *Dunster v. Lord Glen-gall* 47
2. "It is to be kept in mind that, previously to the statute, there was no mode by which Government stock, or

shares in public companies, could be taken in execution at law, or made liable by proceedings in equity, to the demand of the creditor. I apprehend that the object of the statute was to remedy this defect in the law; and accordingly it provides that the charging order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; and with respect to stock, shares, &c., standing in the name of the Accountant-General, the order is to have no greater effect than if the judgment debtor had charged the stock, funds, shares, &c., in favour of the judgment creditor. Now it is clear that the assignee of a chose in action, assigned by an instrument which is available only in equity, must take subject to all equities which subsist against the assignor; and if a judgment debtor charges stock or shares at different times in favour of two parties, the second incumbrancer, until he gives notice, takes subject to the claim of the first; and notice must be given to the trustee of the fund, in order to entitle the second incumbrancer to acquire priority. The first incumbrancer's claim is valid as against the debtor, and is also valid as against the second incumbrancer until the latter acquires priority by giving notice. The statute in terms only gives the same right to the judgment creditor, who obtains the charging order, as if such charge had been made in his favour by the judgment debtor. The petitioner's Counsel in effect require that I should insert the further words in the statute:—'And as if the judgment creditor had given notice of such charge.' It is to be observed that there is a plain distinction between the assignee of a chose in action, who advances his money on the faith of the assignor being the actual owner, and a judgment creditor. The object of the statute, as to the latter, appears to have been to remedy the defect in the law to which I have adverted, that stock and shares could not be

taken in execution at law, or attached by any proceeding in equity."—*Per SMITH, M. R. Dunster v. Lord Glengall* 58-4

## CHARITABLE BEQUEST.

1. Bequest of an annuity to the monks of S., to provide clothing for the poor children attending their schools—*Held* to be valid. *C. Carbery v. Cox* 231
2. *Held also*, that the bequest showed a general charitable intent, which the Court would effectuate, though the school should be accidentally discontinued, or should cease to answer the very description of it in the will. *Ibid.*
3. Bequest of an annuity to the parish priest of D., to provide for the expense of an organ and organist for the chapel of B.—*Held*, valid. *Ibid.*
4. A testator bequeathed an annuity to the monks of M., to be appropriated to the improvement of the chapel of M. The abbot of M., at the time of the testator's death, died:—*Held*, that his successor had no right to the annuity, and that there was no general charitable purpose for which a scheme should be directed. *Ibid.*

## CHILD.

See LEGACY, 1.

## CHOSE IN ACTION.

1. *Quere*—Whether the doctrine of *Dearle v. Hall* (3 Russ. 1) is applicable to an equitable assignment of Railway shares? *R. Dunster v. Lord Glengall* 47
  2. "There is no doubt of the rule that, in order to perfect a valid assignment of a chose in action, it is necessary, as against a subsequent assignee for value or the assignee in bankruptcy, to give notice to the trustee of the fund; otherwise the incumbrancer who first gives notice, or the assignee in bankruptcy, will be preferred."—*Per SMITH, M. R. Id.* 51-2
- "In the case of *Etty v. Bridges*, where, by reason of the death of a person, in

whose name stock was standing, without legal personal representatives, there was no trustee to whom notice could be given, it was held by Vice-Chancellor Knight Bruce, that a second incumbrancer, without notice of the first, by serving a writ of distringas on the Bank of England, thereby gained priority. The same principle has been applied in the case of persons obtaining equitable assignments of, or charges upon a fund in Court. In such case the party who obtains the first stop order gains priority: *Greening v. Bechford, Swayne v. Swayne.*—*Per SMITH, M.R. Dunster v. Lord Glengall* 51-2

"It is a general rule that the assignee of a chose in action, assignable by any instrument available only in equity, must be subject to all equities which subsist against the assignor. According, however, to the doctrine of *Dearle v. Hall, Loveridge v. Cooper, and Etty v. Bridges*, the assignee of a chose in action, who gives notice to the trustee of the fund, will acquire priority over a prior assignee of the fund who has given no notice."—*Per SMITH, M.R. Waller v. Wildridge,* 163-4

#### COMPENSATION.

*See* **TIMBER.**

Where the landlord is seised in fee-simple of the reversion, he is entitled to compensation under the 5th section of the statute for the conversion of the estate in the reversion, to an estate in the fee-farm rent. *R. Ex parte Knox* 57

#### CONDITIONAL ORDER.

1. The conditional order to confirm a sale must be served on the inheritor, even if he have not appeared in the cause. *C. Copeland v. Conway* 286
2. Although, as a general rule, the time for showing cause against a conditional order does not run when the Rolls Court is not sitting, the Lord Chancellor will, under particular circumstances, direct the officer to issue the side-bar rule to lodge the remain-

#### COSTS.

ing three-fourths of purchase-money, though the conditional order to confirm the sale had not been served until after the Rolls Court had risen for the Vacation. *Ibid.*

#### CONFIRMATION.

*See* **RELEASE, 1.**

#### CONSENT.

*Semble*—Where one of the defendants is a *feme covert*, and the suit is respecting her inheritance, the consent of her Counsel to the direction of such an issue would not be binding on her. *R. Rossborough v. Boyse* 540

#### CONSTRUCTION.

*See* **DEED.**

**DEVISE.**

**ESTATE.**

#### CONTRACT.

*See* **AGREEMENT.**

#### CONVEYANCE.

*See* **RELEASE, 1.**

#### CORPORATION.

*See* **AGREEMENT.**

#### COSTS.

*See* **LIEN.**

1. Trustees of real estate, upon trust to sell for the payment of charges, are entitled to the costs of a suit out of the surplus only, after payment of the charges. Where the fund was deficient, the Court refused their costs. *C. White v. Villiers* 125
2. A testatrix bequeathed to trustees £20,000, in trust, for the building and endowment of a college for clerical students connected with the General Assembly of Irish Presbyterians; the same to be built where the trustees should decide, and to be under such rules, &c., as they should determine, subject to the advice and directions of the Assembly. The suit was for the administration of the assets of the testatrix, and to carry into execution the trusts of her will.—*Held*, that the costs incurred by the trustees in the settlement of a scheme for the due application of the £20,000, were

to be borne by that bequest, and not by the general residuary fund. C. *Dill v. Brown* 127

3. The General Assembly (who were not parties to the cause) presented a petition for leave to intervene in the office, as if they had been joined, and that their costs of doing so might be allowed to them out of the £20,000; but the order made on the petition merely provided that they should be at liberty to intervene, if they thought fit, and reserved until the final hearing all questions as to any claim for costs by them. Under this order they proceeded before the Master. *Held* (at the final hearing), that they were not entitled to their costs as against any fund, since they were not parties to the cause so as to be liable to costs; and the order permitting them to intervene did not provide for their costs, as prayed by the petition. *Ibid*

4. Costs refused when the bill was drawn at unnecessary length. C. *Fitzgibbon v. Blake* 328

5. The Court will not decide, on the first hearing of a cause petition for an administration, that the extra costs caused by setting it down as a general cause petition, instead of for a summary reference, should be paid by the petitioner. C. *Green v. Giles* 487

6. The costs of the appointment of a receiver on a judgment on a receiver's recognizance, under the 4 & 5 W. 4, c. 55, and 3 & 4 Vic., c. 105, are chargeable beyond the penalty of the recognizance against the receiver, and *semble*, against his sureties; those costs not being costs at the Petty-bag side of the Court. R. *The Queen v. Dillon* 564

## CROWN.

The Crown is not bound by the Bankers' Acts (33 G. 2, c. 14 (*Ir.*), and 40 G. 3, c. 22 (*Ir.*); and there is no distinction in this respect between a Crown debt proper, and one upon foot of a receiver's recognizance, which is

executed for the benefit of the subject, and is in reality a security between private parties. C. *The Queen v. Guinness* 211

## DEBT.

(*Simple Contract*).

In 1811, T. H. executed a bond, in which his heirs were not bound, and on which he paid interest until his death in 1820. T. H. made his will, by which he left all his property to W. H. H., and directed that all his just debts, legacies and funeral expenses, should be paid by W. H. H., whom he appointed executor. W. H. H. proved the will, and aliened the lands in 1821, without receiving a pecuniary equivalent; he, however, paid interest on the bond until he died in 1843. The parties claiming under the deed of 1821 paid interest up to 1849, under a mistaken belief of their liability. A cause petition was filed in 1853, to recover the amount of the bond from the representatives of W. H. H. *Held* (affirming the order of the Master of the Rolls), that the claim against W. H. H., being founded on a breach of trust created without a specialty executed by him, was a simple contract debt, and as such barred by the Statute of Limitations, 10 Car. 1, sess. 2, c. 6, s. 3 (*Ir.*). C. *Brereton v. Hutchinson* 361

## DECREE.

1. The executor of a trustee having been ordered to invest a sum in stock, to the credit of a cause, and having neglected to do so for two years, during which the funds fell:—*Held* (affirming the Master's order), that he was bound to pay the price of the sum in stock on the day on which he was ordered to invest it, with interest at £3½ per cent. only, from that day. R. *Geraghty v. Geraghty* 414
2. A decree declared a will null and void, and directed an account of by-gone rents, and that the defendants

B †

A and B his wife should, within a month after the date of the Master's report, pay to the plaintiffs the sum which the Master should report to be due on such account. A died, and the suit was revived against his executor; but after A's death, and before the revivor, B filed a further discharge in the Master's office. *Held*, that the decree did not impose a several liability on B; and the Court refused an order that she should pay the sum found due by the report. *R. Rossborough v. Boyse* 540

3. A decree, directing a husband and wife to pay a sum of money, imposes a joint liability on them, which may be enforced during the husband's life; but it does not impose a several liability on the wife, nor can it be enforced against her after the husband's death. *Ibid*

4. If a decree directs a sum of money to be paid, ascertained by a report made or to be made, the report is, by reference, to be considered incorporated in the decree; and the report and decree may be enrolled under the 41 G. 3, c. 90, s. 36. *Ibid*

[S. C. reversed by the Lord Chancellor on appeal.] 629

## DEED.

### See INSOLVENCY.

1. No form of words is necessary to constitute the delivery of an instrument as an escrow. If the real intention of the parties be that the instrument shall not operate at all except and until a specified condition be performed, it is an escrow. *C. Wood v. Knox* 109

Therefore, where the renewal of a lease was executed by the lessors on the promise and faith of immediate payment of the renewal fines, and there was no attesting witness to the execution, it was *Held*, that the renewal was delivered as an escrow. *Ibid*

2. "No two things are more distinct than the delivery of a deed, and its

## DEED.

subsequent deposit, to abide some future event, and the delivery of the deed to be delivered a second time, and to take effect when and if such an event shall occur. The possibility of confounding them may, it is true, be avoided by the observance in the latter case of the only forms of expression which are set forth in *Shepherd's Touchstone* and other books; but these are not absolutely necessary, nor are they the only tests for ascertaining whether the instrument is a deed or an escrow."—*Per BLACKBURN, L. C.* *Id.* 116

3. The dividends of a sum of Bank stock, and another sum in £3¼ per cent. stock, were, by a deed made between E. S., and several of his creditors, assigned to a trustee, in trust to pay the dividends of the Bank stock to E. S., for his maintenance and support, until he should become a bankrupt or insolvent, or assign the same, or until any creditor of his should do any act or acts for the purpose of having same applied in or towards payment of his individual debt, and no longer; and as to the residue of the stock, and as to the said dividends, from and after the time when E. S. should become bankrupt or insolvent, or assign the same, or from and after the time when any creditor of his should proceed to attach the same for payment of his individual debt, upon certain trusts for the benefit of scheduled creditors. The deed contained a proviso, that the deed might be cancelled, or the application of the trust funds changed by the consent of the majority of the scheduled creditors and E. S. A creditor of E. S., who was not a party to the deed, and whose judgment was prior to it, obtained a conditional order to charge the two sums of stock. E. S. showed cause, relying on the deed.—*Held*, that the conditional order was not a proceeding to attach the dividends, which gave effect to the limitations over. *R. Synge v. Synge* 262

4. *Quere*—Whether the limitations over be not void? *R. Syngé v. Syngé* 262
5. No creditor claiming under the deed showing cause, the Court made the order absolute as to the dividends of the Bank stock, but allowed the cause as to the £3½ per cent. stock, the deed being for valuable consideration. *Ibid*

## DEVISE.

1. Lands were devised by a will to D. and J. for their lives, remainder over; and by a codicil, the testator, after revoking the remainders, devised the lands, after the deaths of D. and J., or either of them, to the use of his nephews W. and H., and all and every the child and children of W., begotten or to be begotten, to be equally divided between them, as tenants in common, and the respective heirs of their bodies, lawfully issuing, with cross remainders between them. W. had two children who were alive at the death of D.—*Held*, that the children of W., who were *in esse* at the death of D., took as tenants in common with W. and H., to the exclusion of any who should afterwards be born. *C. Murray v. Murray* 120
2. Where a devise to a class is not immediate, but is postponed to a particular period or to a particular event, those only who answer the description at that period, or on the happening of that event, are entitled to take. *Ibid*
3. In cases relating to the devise of real estates, the Court intervenes only by reason of the existence of some impediment to proceeding at law, in order to have the rights of the parties submitted, by means of that intervention, to a legal issue before a jury; and the Court cannot decide against the verdict of a jury otherwise than by granting a new trial. *C. Rossborough v. Boyse* 489
4. According to the earlier authorities, the Court would not bind the inheritance by one trial, but there is now no ab-

- solute rule requiring the Court as of course to grant a second trial of an issue *devisavit vel non*, unless it is satisfied that a second trial may afford more satisfactory grounds for the final adjudication between the parties. *Ibid*
5. Although, to sustain a case of fraud, and to show that a will has been made under coercion and influence, the evidence must be pointed to the very *factum* of the will, and directly show that the instrument whose validity is disputed was executed under pressure of coercion and undue influence, the jury may, from circumstantial evidence, or from inference and presumption from such evidence, come to the conclusion that coercion and undue influence existed. *Ibid*
6. Where the Judge who tried the case expressed himself not dissatisfied with a verdict in an issue *devisavit vel non*, finding against the will, and the Court concurred in the verdict, and no new evidence had been discovered, although some existed, which the party had not availed himself of, the Court refused to grant a new trial. *Ibid*
7. "According to the constitution and duties of this Court, in questions relating to devises of real estates, the decision of the validity of such devises does not rest with the Judge. He is not placed in the position of the Judge of a Court of Probate, in relation to wills of personal estate, whose province it is, unfettered by any other judgment or opinion, to weigh the evidence before him as a guide to his own original adjudication, and to decide the case accordingly upon its absolute and intrinsic merits. The position of a Judge of a Court of Equity is very different. The litigant parties only appeal to his intervention, because of some impediments existing to their proceeding by the ordinary course of ejectment in the Courts of Common Law, for the purpose of having their rights

submitted, by means of that intervention, to a legal issue before a jury; and when the verdict of the jury is returned to him he cannot decide against it, otherwise than by remitting the case for a new trial to another jury. This is the limit of his power, and the foundation of the principle on which he is to act. It is plain that such power is not to be capriciously or arbitrarily exercised, and that it is not to be put in force simply at the instance of the defeated party, as a matter of course, or on mere speculation. Faith must be given to the solemn finding on oath of a fairly selected jury, acting with the assistance and under the directions of a Judge of a Court of Law; and unless that Judge be himself dissatisfied with the verdict, or there shall appear in the evidence to be matters of sufficient weight, notwithstanding such finding, to induce the Court to take upon itself the responsibility of declining to act on the first verdict, and asking the aid of a further inquiry of the same nature—in other words, unless the Court shall think it more satisfactory for its guidance to the final result, that the case should again be submitted to a trial in a Court of Law, that finding ought to remain, and must remain, undisturbed.”—*Per* BRADY, L. C. *Rossborough v. Boyse* 496-7

8. The Court of Chancery cannot determine the validity of a will of real or personal estate. It can only remove impediments to an ejectment at law, to try the validity of a devise of real estate, and cannot direct an issue *devisavit vel non*, unless the defendant consents. R. *Rossborough v. Boyse* 540
9. *Semble*—Where one of the defendants is a *feme covert*, and the suit is respecting her inheritance, the consent of her Counsel to the direction of such an issue would not be binding on her. *Ibid*

## DISMISSED SUIT.

A fund ordered to be paid to the sur-

viving plaintiff, in an injunction suit, abated and dismissed by the 81st General Order of 1843. R. *Thomas v. Thomas* 399

## DIVORCE.

A marriage celebrated in England, between a native and domiciled Scotchman and an Irishwoman, may be dissolved by a decree for a divorce pronounced by the Court of Session in Scotland. C. *Maghee v. McAlister* 604

## DRAINAGE ACT.

The 52nd section of the 8 & 9 Vic., c. 69 (the Drainage Act), only applies to cases within the 29th and 30th sections of that Act; and, therefore, when the effect of the drainage operations of the district was to injure the water-power of a mill, but no dam, &c., connected with the mill, was altered, and the original water-power could not be secured without reinstating the district in the same position in which it had been before the commencement of the drainage operations—*Held*, that the owner of the mill was not entitled to maintain a petition under the 52nd section. C. *Malley v. Hornsby* 520

## ELECTION.

1. By marriage articles, Blackacre, the property of the wife, was limited to the husband and wife for their lives and the life of the survivor of them, with remainder, subject to a term to secure portions of £1000 for younger children of the marriage, to the first and other sons of the marriage, in tail; and Whiteacre, the property of the husband, was settled upon the husband and wife and the survivor of them, for their lives, with power for the survivor to appoint Whiteacre to any one or more of the children of the marriage: and in default of appointment, equally amongst them. The wife died first, leaving a son and a daughter. The husband, by his will, devised and appointed Blackacre to the son, and devised, limited and ap-

## ELECTION.

pointed Whiteacre to the daughter for her life, with remainder to the son, in case he should survive her; and declared it to be his intention that "the bequest to her should be taken as and for any sum or claim she might have under and by virtue of his marriage settlement, or any other deed executed by him."—*Held*, that the daughter was bound to elect between the £1000 portion and the benefit given her by the will. *C. Fearon v. Fearon* 19

2. There is not any authority for the proposition, that a case for election can only be raised where the property conferred upon a person, in lieu of that to which he would otherwise be entitled, must be the absolute property of the giver; an appointment, under a power vested in him, is sufficient to compel the appointee to elect. *Ibid*
3. A testator having, under his marriage settlement, a power of appointing a sum of £1500 amongst his children (which sum was, in default of appointment, to be divided amongst them equally), and having only two sons, H. and W., appointed to his son H. £1, and to his son W. £1; and as to the residue, appointed the same to his son W., adding:—"I request him to have the same invested on mortgage or in the purchase of lands, and settled on himself for life, with remainder to his child or children as he may appoint, with remainder to such child or children of my son H. as he may appoint, with remainder to my own right heirs." The testator, out of his own property, conferred by his will other benefits upon W.—*Held*, that W. was bound to elect between his rights under the settlement and his rights under the will. *C. Moriarty v. Martin* 26

4. W. having, during his lifetime, done acts which were held to amount to an election to take under the will, and having died without children—*Held*, that the precatory words, contained in the will, constituted a valid trust in favour of the children of H., al-

## EQUITABLE MORTGAGE. 653

though they were not objects of the power contained in the settlement.

*Ibid*

### ELEGIT.

1. Neither the suing out of an elegit, nor the appointment of a receiver, on a judgment not redocketed or revived, as required by the 9 G. 4, c. 35, will render it valid against a subsequent purchaser for valuable consideration. *P. C. In re Judge* 152
2. "The question which we have had to consider is, whether an elegit can have any force or validity after the judgment on which it was sued has become null and void? We are of opinion that it cannot. The validity of the elegit depends on the validity of the judgment. If the purchaser were in possession, and the elegit creditor were to bring an ejectment, his first step at the trial must be to prove his judgment. The elegit creditor must do the same, if he were in possession, and the ejectment was brought against him. If the judgment be null and void as against a purchaser, the foundation of the elegit creditor's title fails. The estate by elegit cannot be considered as conferring a title independent of the judgment."—*Per BRADY, L. C. Id.* 154

### ENROLMENT.

If a decree directs a sum of money to be paid, ascertained by a report made or to be made, the report is, by reference, to be considered incorporated in the decree; and the report and decree may be enrolled under the 41 G. 3, c. 90, s. 36. *R. Rossborough v. Boyse* 540

## EQUITABLE MORTGAGE.

An equitable mortgagee, by deposit of Railway shares, is entitled to priority over a prior judgment creditor of the mortgagor, who has obtained an order charging the shares under the 3 & 4 Vic., c. 105, s. 23, subsequently to the mortgage. *R. Dunster v. Lord Glengall* 47

## ESCROW.

1. No form of words is necessary to constitute the delivery of an instrument as an escrow. If the real intention of the parties be that the instrument shall not operate at all except and until a specified condition be performed, it is an escrow. Therefore, where the renewal of a lease was executed by the lessors on the promise and faith of immediate payment of the renewal fines, and there was no attesting witness to the execution, it was *Held*, that the renewal was delivered as an escrow. C. *Wood v. Knox* 109

2. "No two things are more distinct than the delivery of a deed, and its subsequent deposit, to abide some future event, and the delivery of the deed to be delivered a second time, and to take effect when and if such an event shall occur. The possibility of confounding them may, it is true, be avoided by the observance in the latter case of the only forms of expression which are set forth in *Shepherd's Touchstone* and other books; but these are not absolutely necessary, nor are they the only tests for ascertaining whether the instrument is a deed or an escrow."—*Per* BLACKBURN, L. C. *Id.* 116

## ESTATE.

1. An estate was conveyed by deed to D. P. for life, remainder to his first and every other son successively, and the *heirs male* of each such son lawfully issuing, remainder to the right heirs of D. P.
2. *Quere*—Whether the fee vested in the sons of the marriage? C. *Persse v. Persse* 196

## ESTOPPEL.

A writ of *scire facias* on a recognizance recited the recognizance, which purported to be taken by S., a Master Extraordinary of the Court for the county of R. The plea traversed the allegation that S. was a Master Extraordinary for the county of R. *Held*, on demurrer, that the plea was bad, as

the recital of the recognizance estopped the defendant from denying any of the material facts appearing therefrom, though afterwards substantively alleged. C. *The Queen v. Irwin* 638

## EVIDENCE.

*See* DEVISE, 5, 6.

## INSURANCE.

An order cannot be made in a cause petition against a minor without proofs. C. *Holmes v. Holmes* 126

## EXECUTION.

*See* JUDGMENT, 7, 8, 9.

## RECOGNIZANCE, 1.

## EXECUTOR.

1. The general rule is, that though there be a decree for the administration of assets, a creditor of the testator or intestate will not be restrained by injunction from proceeding at law to make the personal representative liable *de bonis propriis*; but where a legatee, who has proved in the Master's office under the decree, brings an action at law against the executor for the legacy, the Court will enjoin him, though the judgment in the action should be *de bonis propriis*; for the Court by its decree has taken upon itself to decide upon the question of assets, without which the plaintiff at law cannot recover, and will not permit that question to be tried at law. R. *Molyneux v. Scott* 291
2. To make an executor liable at law for a legacy *de bonis propriis*, there must be an express promise in writing, and assets or some other consideration. *Ibid*
3. The cases on the latter question reviewed and considered. *Ibid*
4. *Semble*—On the plaint for a legacy, against the defendant as executor, and not averring that the defendant promised in writing to pay the legacy, the judgment should be *de bonis testatoris*. *Ibid*
5. An executor lent a sum of £4100 of his testator's assets, on the security of a property, worth at the time between £60,000 and £70,000, and incumbered to the amount of £27,000. The so-

licitor for the borrower was also employed for the executor, the lender. No opinion of Counsel was taken on the title, and no searches were made, as it had been done on two occasions within seven years, on other loans. The security having turned out defective in value, the executor was decreed to bring in the money. *C. Waring v. Waring* 331

6. The executor of a trustee having been ordered to invest a sum in stock, to the credit of a cause, and having neglected to do so for two years, during which the funds fell:—*Held* (affirming the Master's order) that he was bound to pay the price of the sum in stock on the day on which he was ordered to invest it, with interest, at  $\text{£}3\frac{1}{2}$  per cent. only, from that day. *R. Geraghty v. Geraghty* 414

## EXEMPTION.

In 1731, the lands of B. and M., with so much of the tithes as were vested in the lessor, were demised for fifty-one years. In 1764, F. became entitled to the interest in the lease, and so continued until 1782, when it expired. The lands of B., C. and M. were demised to F., for lives, with covenant for perpetual renewal, in 1751.

In 1766, the tithes of B., C. and M. were demised for lives, with covenant for perpetual renewal. In 1813 and 1832, renewals of the lease were granted, the interest of which was vested in A. In 1834, a tithe composition was made in the parish where the lands were situate, and the Commissioners certified that a certain proportion of the tithes was payable to those claiming under the lease of 1766, and the remainder to the vicar. There was no evidence of the payment of tithes for sixty years previous to 1834.—*Held*, overruling objections to the Master's report, that the right of exemption from the payment of tithes, under the 1 & 2 *Vic.*, c. 109, s. 18, was not established, the case falling within the exception in section 20. *R. Ellis v. O'Neill* 280

The exception in that 1 & 2 *Vic.*, c. 109, s. 20, is not confined to the case of a demise of tithes to the owner or occupier of the lands in respect of which the tithes are payable. *Ibid*

[S. C. reversed by the Lord Chancellor.] 629

## EXTINGUISHMENT.

See RENEWAL, 2.

STATUTE OF LIMITATIONS, 1.

## FEE FARM GRANT.

See COMPENSATION.

RENEWABLE LEASEHOLD ACT.

## FEME COVERT.

See MARRIED WOMAN.

## FINES.

The interest in a lease for lives renewable for ever was settled on A for life, remainder, subject to a jointure to A's wife, to the use of his children, who were minors. In 1839, one of the lives being dead, a negotiation for a renewal took place between A and B, one of six parties entitled to the reversion, acting on behalf of all. In 1847, a renewal was executed as an escrow by the reversioners, on the promise, which was not fulfilled, of immediate payment of the fine. In July 1849, a demand in writing of the renewal fines was made by B, on behalf of himself and the other parties interested, on A. In March 1851, another *cestui que vie* having died in the meantime, A tendered the amount of the renewal fines. *Held*, that the right to a renewal had been forfeited, and a petition for that purpose was accordingly dismissed, with costs. *C. Wood v. Knox* 109

## FORFEITURE.

See FINES.

RENEWAL.

## FRAUD.

See AGENT.

BANKRUPTCY.

TRUST.

Although, to sustain a case of fraud, and to show that a will has been made under coercion and influence, the evi-

dence must be pointed to the very *factum* of the will, and directly show that the instrument whose validity is disputed was executed under pressure of coercion and undue influence, the jury may, from circumstantial evidence, or from inference and presumption from such evidence, come to the conclusion that coercion and undue influence existed. C. *Rossborough v. Boyse* 489

### FRAUDULENT PREFERENCE.

In order to constitute a fraudulent preference, it is not sufficient that a payment or security was voluntary, and made at a time when the trader was in insolvent circumstances. It is necessary to show that it was made in contemplation of bankruptcy. Bkt. Ct. *In re Ryan* 33

### FUNDS.

1. A sum was received by a respondent from the tenants subsequently to the appointment of a receiver by a puisne creditor. The receiver, in his account, was charged with the sum as received by him, and a conditional order for an attachment was obtained against the respondent, before the extension of the receiver by a prior creditor.—*Held*, that as the tenants paid the sum prior to the extending order, it was to be considered as a sum paid by the tenants for the receiver, and that the petitioner in the first matter was entitled to it. R. *O'Callaghan v. O'Callaghan* 376
2. A fund ordered to be paid to the surviving plaintiffs, in an injunction suit, abated and dismissed by the 81st Order of 1843. R. *Thomas v. Thomas* 399

### HUSBAND AND WIFE.

#### See CONSENT.

1. A decree declared a will null and void, and directed an account of by-gone rents, and that the defendants, A and B his wife, should, within a month after the date of the Master's report, pay to the plaintiffs the sum which

### INJUNCTION.

the Master should report to be due on such account. A died, and the suit was revived against his executor; but after A's death, and before the revivor, B filed a further discharge in the Master's office. *Held*, that the decree did not impose a several liability on B; and the Court refused an order that she should pay the sum found due by the report. R. *Rossborough v. Boyse* 443

2. A decree, directing a husband and wife to pay a sum of money, imposes a joint liability on them, which may be enforced during the husband's life; but it does not impose a several liability on the wife, nor can it be enforced against her after the husband's death. *Ibid*
3. B, the wife of A, claimed certain lands, as devisee under a will, which the decree in a suit, instituted by the heir against A and B, declared to be null and void. The decree further directed an account of all sums received by A and B, or either of them, on account of the said lands, and ordered the defendants to pay the sum to be found due on taking such account. A died before the Master's report was made up. The suit was revived against his personal representative. The Master found the sum received by A and B. *Held*, that B was personally responsible for the entire amount by the Master's report found to be due. C. *Rossborough v. Boyse* 629
- A decree, directing a husband and wife to pay a sum of money, in respect of the rents and profits of lands received by the wife, or by the husband, in her right, may be enforced against the wife after the husband's death. *Ibid*

### INCUMBERED ESTATES ACT.

#### See RECEIVER, 5.

### INJUNCTION.

1. On a motion for an injunction to restrain the infringement of a patent, an order was made that the motion

should stand until the plaintiff brought an action at law. There was a verdict for the plaintiff, and the defendant tendered a bill of exceptions, pending which the motion was renewed; the Court granted an injunction, the plaintiff undertaking to abide any order which the Court might make, by directing an issue, or otherwise, to ascertain the damage, if any, which the defendants should sustain by obeying the order, in case the defendant should obtain judgment in the action at law. R. *Baxter v. Combe* 245

2. Principles which guide the Court in granting or withholding an injunction after verdict, but before the legal right is finally determined. *Ibid*

3. "The Court has a right to consider all the circumstances; and although it is not bound to grant an injunction after a verdict, in a case such as *Hill v. Thompson*, or *Bridson v. McAlpine*, still, on the other hand, the Court may, in the exercise of its authority, and of a well regulated discretion, consider the circumstances of the case, and grant the injunction, if it be proper to do so, though the legal right has not been finally determined."—*Per SMITH, M. R. Id.* 250

4. S. C. affirmed on appeal. C. 256

5. "The Court feels itself bound, *prima facie*, to make an order for the injunction on the verdict of a jury, although it is not of course to make it when the question is still open in a Court of Law. The authorities all state that the question is one to be determined by the circumstances of each particular case."—*Per BRADY, L. C. Id.* 251

6. The general rule is, that though there be a decree for the administration of assets, a creditor of the testator or intestate will not be restrained by injunction from proceeding at law to make the personal representative liable *de bonis propriis*; but where a legatee, who has proved in the Master's office under the decree, brings an action at law against the executor for the legacy, the Court will enjoin

him, though the judgment in the action should be *de bonis propriis*; for the Court, by its decree, has taken upon itself to decide upon the question of assets, without which the plaintiff at law cannot recover, and will not permit that question to be tried at law. R. *Molyneux v. Scott* 291

7. An injunction against felling timber having been obtained against the respondent, on a motion to dissolve it, the Court directed an action to be brought. An action having been brought, and the respondent having obtained judgment in the Exchequer Chamber, the Court dissolved the injunction, notwithstanding the pendency of a writ of error to the House of Lords; it not appearing that irreparable mischief would be done to the petitioner by dissolving the injunction. R. *Earl of Mountcashell v. Viscount v. O'Neill* 455

8. The M. G. W. Railway Company had purchased, under the sanction of an Act of Parliament, the Royal Canal, and all the property belonging to it; and they afterwards entered into a contract with the Grand Canal Company to purchase the Grand Canal and its property, and that until an Act of Parliament could be obtained for the purpose, a lease should be made by the Grand Canal Company to the M. G. W. Railway Company, under the provisions of the Canal Carriers' Act, 8 & 9 Vic., c. 42. The agreement was adopted at a meeting of the Grand Canal Company, and a draft lease approved of, which comprised not only the tolls and duties of the canal, but also all the real estate and personal property belonging to the Grand Canal Company. *Held*, on a petition filed by two shareholders of the Grand Canal Company, to restrain the Company from executing the lease, that although the lease *per se* was within the Canal Carriers' Act, as it was part of the arrangement for the transfer of the canal and its property to the Railway Company, it was illegal; and the Court granted an injunction to prevent the execution of

c †

it. C. *McDonnell v. The Grand Canal Company* 578

9. The Court will not consider the *quantum* of interest of shareholders in a Company who seek for an injunction, nor whether their interest would entitle them to vote at a meeting of the Company; but where the petitioners had purchased two shares for a nominal consideration, after the agreement which they complained of had been entered into, and with full notice of it, and for the purpose of preventing its completion, the Court refused an injunction. *Ibid*

10. An injunction against felling timber was obtained against the respondent; but the respondent by his affidavit in answer claimed the timber as his own property; and on a motion to dissolve the injunction, founded on that affidavit, the Court directed an action to be brought to try the legal right. An action having been brought, the respondent obtained the judgment of the Court of Exchequer Chamber, one Judge alone dissenting. The petitioner sued out and prosecuted a writ of error to the House of Lords. *Held*, reversing the order at the Rolls, that the injunction ought to be continued. C. *Earl of Mountcashell v. Viscount O'Neill* 619

### INSOLVENCY.

1. The dividends of a sum of Bank stock, and another sum in £3½ per cent. stock, were, by a deed made between E. S. and several of his creditors, assigned to a trustee, in trust, to pay the dividends of the Bank stock to E. S., for his maintenance and support, until he should become a bankrupt or insolvent, or assign the same, or until any creditor of his, should do any act or acts for the purpose of having same applied in or towards payment of his individual debt, and no longer; and as to the residue of the stock, and as to the said dividends, from and after the time when E. S. should become bankrupt or insolvent, or assign the same, or from and after the time when any creditor of his should pro-

ceed to attach the same for payment of his individual debt, upon certain trusts, for the benefit of scheduled creditors. The deed contained a proviso, that the deed might be cancelled, or the application of the trust funds changed by the consent of the majority of the scheduled creditors and E. S. A creditor of E. S., who was not a party to the deed, and whose judgment was prior to it, obtained a conditional order to charge the two sums of stock. E. S. showed cause, relying on the deed. *Held*, that the conditional order was not a proceeding to attach the dividends which gave effect to the limitations over. R. *Synge v. Synge* 262

2. *Quære*—Whether the limitations over be not void? *Ibid*
3. No creditor claiming under the deed showing cause, the Court made the order absolute, as to the dividends of the Bank stock, but allowed the cause as to the £3½ per cent stock, the deed being for valuable consideration. *Ibid*
4. W. C. being entitled to an annuity, and to a certain fund in reversion, on his first marriage, assigned them to trustees, in trust, to pay the annuity to W. C. for life, or until he should become bankrupt or insolvent; and from the time of his death, or of his so becoming bankrupt or insolvent, upon trust, in favour of the wife and the issue of the marriage. Upon his second marriage, W. C. assigned to trustees another fund, to which he was entitled after the death of A., in trust, for himself for life after the death of A., or until he should fail in circumstances, or become bankrupt or insolvent; and after his decease, bankruptcy or insolvency, to pay the principal sum amongst his two children of the first marriage, and the issue of the second marriage, as he should appoint, &c. *Held*, that the insolvency in the settlement on W. C.'s first marriage, on which the limitation over was to take effect, was an inability to pay his debts, and not taking the benefit of the Insolvent Act.

*Semble*—A limitation in a settlement, that the settlor's property shall go over on his insolvency, is valid.

*Held*, that the limitations in both the said settlements were valid as against trustees, to whom W. C. had assigned his life interests for the payment of his creditors, when he was unable to meet his debts and liabilities.

*Held also*, that a failure, bankruptcy or insolvency, meant by the second settlement, before the death of A., the first tenant for life, would give effect to the limitation over. R. *In the matter of Casey's Trusts* 419

## INSURANCE.

Lands were, by a marriage settlement of 1801, conveyed to trustees, in trust, for C., the intended wife, for life, remainder to B., the intended husband, for life, remainder in trust for the younger children of the marriage, with a power to the trustees to sell the lands, and lay out the produce in the purchase of other lands, in fee, or in Government securities. There was one younger child of the marriage, K. The trustees sold the lands, and lent a portion of the purchase-money to B., on the security of his bond and warrant, and a policy of insurance on his life, which was effected by the trustees. By a deed of 1832, to which neither K. nor her trustees were parties, B. and his eldest son R. conveyed other estates, of which B. was tenant for life, with remainder to R. in tail, to the use of a trustee, for 500 years, to raise by mortgage a sum of £16,000, to pay off incumbrances; and after reciting that bonuses had accrued on the policy of insurance to the amount of £2500, and that B. had agreed, in order to indemnify R.'s estate, to assign to the trustee of the term all his interest in the policy of insurance, and all bonuses thereon, B. assigned all his interest in the said policy of insurance, &c., in trust, to apply the produce thereof in payment or part payment of the sum of £16,000, intended to be borrowed.

The £16,000 was, in 1834, raised by mortgage of the term, without referring to the policy or indemnity clause in the deed of 1834. By deeds of 1839 and 1843, the surviving trustee of the deed of 1801 assigned the judgment and the policy of insurance to R., as a new trustee, on the trusts of the deed of 1801; and C. and K. accepted the judgment and policy as a proper investment of the trust fund. Further bonuses afterwards accrued on the policy. *Held*, that the mortgagees were not entitled to the bonuses, under the indemnity clause of the deed of 1832.

*Quære*—Whether K. was entitled to the bonuses as against R.?

*Held*, that the deed of 1832, though not binding on K., might be read as evidence of the title of the mortgagees. R. *O'Grady v. Brady* 439

## INTEREST.

*See* RECEIVER, 1.

SURETY, 1.

## JUDGMENT.

*See* ACKNOWLEDGMENT.

RECEIVER, 2, 3, 4, 5.

1. Whether judgments entered within twenty years before the passing of the Re-docketing Act, 9 G. 4, c. 35, and not re-docketed within twenty years from their entry, or within five years from the passing of the Act, are void as against a purchaser (a mortgagee of 1825), who became such before the passing of the Act? *Quære*.

*Held*—That such judgments were void as against a sub-mortgage (made in 1841) of the mortgage of 1825. C. *Walcott v. Condon* 1

2. "I have now to dispose of the plaintiff's claim to priority as against the judgments of 1819. My opinion remains the same as that which, along with Mr. Justice Crampton, I, when Chief Justice, certified in a case, *Colyer v. Marnell*, sent to the Court of Queen's Bench by this Court. I, therefore, am of opinion, that the

mortgage of 1825, and the sub-mortgage of 1841, ought to have priority over the judgments of 1819; but I think that, in deference to the decision of my predecessor, in *Hickson v. Collis*, and in the conflict of judicial opinions on this subject, I ought not to act on the opinion, although I express it; and therefore *pro forma* I decree in favour of the judgment creditors."—*Per* BLACKBURNE, L. C. *Walcott v. Condon* 14

3. A judgment obtained against a bankrupt, and registered as a mortgage, under the 6th and 7th sections of the 13 & 14 *Vic.*, c. 29, before the issuing of the commission, is a charge on the bankrupt's lands, in priority to his simple contract debts. Bkt. Ct. *In re Ryan* 33

4. The 13 & 14 *Vic.*, c. 29, thus repeals the 126th section of the 6 *W.* 4, c. 14, the leading Irish Bankrupt Act. *Ibid*

5. *Quere*.—Whether an affidavit made by one only of several co-defendants is a sufficient compliance with the terms of the 6th section? *Ibid*

6. "And this brings me to the all-important question—namely, the legal operation and effect of the registration, under the mortgage clauses of the last statute on judgments. I believe it is the first time that this extraordinary and mischievous enactment has been brought under the notice of any Court. I say deliberately, that the provisions contained in the 6th and 7th sections of the 13 & 14 *Vic.*, c. 29, must be attended with the most injurious consequences to the commercial interests of Ireland; consequences strangely overlooked by the person, whom I know not, who prepared those clauses. It is due to this Court to state publicly, that this Act was introduced without any communication with Mr. COMMISSIONER PLUNKET or myself; and I should, probably, have remained in complete ignorance of this injurious legislation until the present question was raised, were it not for the habit

of reading the Acts passed each session immediately on being published, and I thus first discovered these clauses, which are to transmute a mere judgment creditor, by his own act exclusively, into a complete mortgagee. I must say, in conclusion, that I am strongly of opinion that before the close of the present session of Parliament, a clause ought to be introduced into some Irish Act, to the effect that no such mortgage as this should, in the event of the bankruptcy of the consor of a judgment, or other party liable, give any priority over the other creditors under the commission."—*Per* MACAN, B. C. *Id.* 41-42

7. Neither the suing out of an *elegit* nor the appointment of a receiver on a judgment not redocketed or revived as required by the 9th G. 4, c. 35, will render it valid against a subsequent purchaser for valuable consideration. P. C. *In re Judge* 152

8. Judgment by default was entered up on a receiver's recognizance; a *levari* issued against the surety, and the Sheriff returned goods on hands for want of buyers. An injunction was granted against the *levari*, on payment of the amount of it into Court. The surety applied to set aside the judgment by default, and an order was made that the judgment should stand, but that the surety might be at liberty to plead to the *scire facias*. He did plead, and a demurrer taken to the rejoinder was allowed; and it was ordered that judgment be entered up for the plaintiff, which was accordingly done.—*Held*, that the latter judgment was irregular, and the first, not being a continuing judgment, and being determined by the death of the receiver, a *levari* could not be sued out on it.

The practice of the Petty-bag side of the Court, and of the three Law Courts, under those circumstances, certified to the Master of the Rolls.

R. *In the matter of Herricks minors* 183

"It appears to me to be contrary to the principles of the Common Law—first, that two judgments should be entered on the same security; and secondly, where a security is not a continuing security (and the recognizance in this case had, as I have already stated, ceased to be a continuing security by the death of the receiver in 1849), that a party should mark his execution for a sum which he now alleges was too small; and that after the Sheriff's return, and the amount of the *levari* lodged in Court, he should seek to mend his hand by issuing a further execution for nearly an equal amount. As to the course of practice in England, I apprehend there is no doubt that such a proceeding never was heard of there."—*Per SMITH, M. R. Id.* 189

## JURISDICTION.

See *APPEAL*.

DEVISE, 3, 5, 6, 7, 8.

## LANDLORD.

Where the landlord is seised in fee-simple of the reversion, he is entitled to compensation, under the 5th section of the statute for the conversion of the reversion to an estate in the fee-farm rent. *C. Ex parte Knox* 57

## LEASE.

1. The M. G. W. Railway Company had purchased, under the sanction of an Act of Parliament, the Royal Canal and all the property belonging to it; and they afterwards entered into a contract with the Grand Canal Company to purchase the Grand Canal and its property, and that until an Act of Parliament could be obtained for the purpose, a lease should be made by the Grand Canal Company to the M. G. W. Railway Company, under the provisions of the Canal Carriers' Act, 8 & 9 Vic., c. 42. The agreement was adopted at a meeting of the Grand Canal Company, and a draft lease approved of, which comprised not only the tolls and duties of the canal, but also all the real estate

and personal property belonging to the Grand Canal Company. *Held*, on a petition filed by two shareholders of the Grand Canal Company, to restrain the Company from executing the lease, that although the lease *per se* was within the Canal Carriers' Act, as it was part of the arrangement for the transfer of the canal and its property to the Railway Company, it was illegal; and the Court granted an injunction to prevent the execution of it. *C. McDonnell v. The Grand Canal Company* 578

2. The Royal Canal and the Grand Canal run parallel to each other for a short distance, and then diverge and fall into the River Shannon at some distance from each other.

*Held*, that as they communicate with each other by water, they are within the Canal Carriers' Act, so as to enable the Grand Canal Company, under that Act, to make a lease of their tolls and duties to the M. G. W. Railway Company, who had become proprietors of the Royal Canal. *Ibid*

## LEGACY.

1. A testator, by his will, made in 1840, in case of his wife having a child after his death, left to that child eight shares he had in the N. Bank, and ten shares in the B. Bank.—*Held*, that three children born after the will, and before the testator's death, were entitled to the shares. *C. In re Lindsay* 239
2. "The result of the two cases of *Rann v. Hughes*, and *Deeks v. Strutt*, was that an express promise, without the existence of assets or some other consideration, would not make the executor liable personally, nor would assets, without an express promise, make him so liable. In order to create a personal liability in him, both must be combined, *i. e.*, assets or some other consideration, and an express promise—and the express promise must, under the Statute of Frauds, be in writing." *Per SMITH, M. R. Molyneux v. Scott* 297

3. A sum of £1000 was left by a will to M. V. By a codicil, if M. V. should be married, and not leave children or child alive, the £1000, left by the will, was to become the property of E. S. and F. S., but if M. V. "should ever marry, and leave a child alive, or children, in that case she can leave the said £1000 as she thinks proper, to one or amongst any children she may have." By a further codicil, the £1000 was left "to M. V.; but if she died without children, it was to become the property of E. S. and F. S." M. V. married, and died, leaving no child, but leaving a grandchild, the son of a deceased daughter, to whom she had appointed the £1000 on her marriage.—*Held*, that the bequest was an absolute one to M. V., with an executory bequest over to E. S. and F. S., if she should die without leaving issue living at her death, whether children or remoter issue, which, in the events which had happened, had failed. R. *In the matter of Synge's Trusts* 379

4. A testator, by his will, dated in 1798, gave to his wife the sum of £1500, which he was possessed of by the death of his mother, and which he became entitled to under the marriage settlement of his father. By a codicil, in 1800, after stating that his brother E. had married and had children, he willed that after the death of his wife, the children of his two brothers E. and F. (should F. marry and have issue) "should have the sum of £1687, which he got by the death of his mother, and that was charged on the estate of A, in such proportions as his wife should will it." At the date of the codicil, the £1687, which was the same sum as that left by the will, was lent on a judgment against A. It was paid off in 1803, and invested by the testator in £3½ per cent. stock. *Held*, that the legacy given by the codicil to the children of the testator's brothers was a general or demonstrative legacy (not a specific one), and was not adeemed by the payment of the judg-

ment and investment of the moneys in the funds. R. *Thomas v. Thomas* 399

## LEVARI.

See JUDGMENT, 5.

RECOGNIZANCE 1.

## LIEN.

A bill for an injunction was filed by W. in a cause of W. v. S., to restrain S. from suing at law on certain bills of exchange: notice of a motion to give security for costs was served, pending which W. obtained a decree *pro confesso*, whereby it was referred to the Master to take an account of the money *bona fide* advanced by S. to W., who undertook to pay any balance which should be found due by him on the account. An order was afterwards made, on consent, that the decree and injunction should be set aside, S. undertaking to file his answer within a month; and that he should have a lien on the funds reported or decreed in the cause of W. v. M'K., and if the answer was not filed within a month, that the decree and injunction should remain in force. Afterwards E. obtained an order in the cause of W. v. M'K., that the same funds should be charged with a sum in favour of E., and that when the funds should be allocated, he should be at liberty to file a charge, and be reported the said sum. *Held*, that S. had acquired a lien on the funds for any demand for costs, or otherwise, which he should establish his right to in the suit of W. v. S.; and that he had priority over E., neither party having lodged his order with the Accountant-General. R. *Waller v. Wildridge* 155

## LIMITATION.

See DEED, 3, 4, 5.

ESTATE, 1, 2.

## LIMITATIONS.

See STATUTE OF LIMITATIONS.

## LOAN.

"The employment of the same professional person, in the ordinary case of vendor and purchaser, is, from the

conflicting nature of the duties which each employer has a right to have performed, for obvious reasons highly objectionable. Practically, and for the most obvious reasons, it is equally, if not more so, for the lender to employ the borrower's solicitor. Though there is not a conflict of rights, there is an opposition of interests, and the solicitor for the borrower must be anxious to remove the very difficulties which it is his duty to discover and suggest. There is, in short, such an inconsistency in the interests of each party, that a common agent of both can hardly do his duty to the one without betraying or neglecting his duty to the other."—*Per BLACKBURNE, L. C. Waring v. Waring* 337

## LUNATIC.

A lunatic may be permitted to travel in England, on proper security being given; but the Court will not give leave to the committee to take the lunatic out of the United Kingdom, on a medical certificate that it would be to the advantage of the lunatic to travel in a Continental climate. *C. In re Hackett* 375

## MARRIAGE.

A marriage celebrated in England, between a native and domiciled Scotchman and an Irishwoman, may be dissolved by a decree for a divorce pronounced by the Court of Session in Scotland. *C. Maghee v. McAllister* 604

## MARRIED WOMAN.

See SEPARATE ESTATE, 2.

1. The interest due at the time of a fund settled to the separate use of a married woman, with a clause against anticipation, charged with the amount of a promissory note indorsed by her. *C. Fitzgibbon v. Blake* 328
2. But *semble*, interest which accrued due after the date of the promissory note could not be charged with it. *Ibid*

## MINOR.

An order cannot be made in a cause

petition against a minor, without proofs. *C. Holmes v. Holmes* 126

## MISJOINDER.

1. The uses to which the estate was to be conveyed, by the deed of 1827, were to D. P., remainder to the first and every other son of his first marriage successively, and the *heirs male* of each such son lawfully issuing; remainder to the right heirs of D. P., who, on the settlement executed on his second marriage, conveyed his supposed reversion to the use of the children of the second marriage. D. P. and his children of both marriages were plaintiffs in the original and supplemental suits.

*Quære*—Whether the fee vested in the sons of the first marriage, and whether the children of the second marriage took any estate? *C. Persse v. Persse* 196

2. But as the House of Lords had declared that the children of the second marriage were entitled to the benefit of the deed of 1827, the Court held that there was no misjoinder of plaintiffs in the supplemental suit. *Ibid*

## MONKS, BEQUEST TO.

1. Bequest of an annuity to the monks of S., to provide clothing for the poor children attending their schools—*Held* to be valid. *C. Carbery v. Cox* 231
2. *Held also*, that the bequest showed a general charitable intent, which the Court would effectuate, though the school should be accidentally discontinued, or should cease to answer the very description of it in the will. *Ibid*
3. Bequest of an annuity to the parish priest of D., to provide for the expense of an organ and organist for the chapel of B:—*Held*, valid. *Ibid*
4. A testator bequeathed an annuity to the monks of M., to be appropriated to the improvement of the chapel of M. The abbot of M., at the time of the testator's death, died. *Held*, that his successor had no right to the an-

nuity, and that there was no general charitable purpose for which a scheme should be directed. *C. Carbery v. Cox* 231

## MORTGAGE.

1. In 1820, Blackacre and other lands were mortgaged for £1200. The equity of redemption in Blackacre having subsequently devolved upon A, he mortgaged it in 1825 to the plaintiff. In 1830, A contracted with B, that on B's paying to the mortgagee of 1820 the sum of £565, then remaining due on that mortgage, an annuity of £66 per annum should be "effectually granted to B out of the mortgaged premises." B paid £565 to the mortgagee of 1820. By deed of the 7th of November 1830, to which the only parties were the mortgagee of 1820, and C, the brother of A, reciting that £1454 was due on the mortgage of 1820, the mortgagee, in consideration of £1281, expressed to be paid to him by C "and others for his use," conveyed Blackacre and the other mortgaged lands and the mortgage debt to C, his executors, administrators and assigns. By a deed, bearing date on the following day, reciting the mortgage of 1820, and that C had become entitled to it, and that A had become entitled to "several parts of the mortgaged premises," and that A and C had agreed to grant an annuity out of those premises—they, in consideration of £565, expressed to be paid to them, granted the annuity of £66 to B out of the mortgaged premises, including Blackacre. Then followed a covenant by A to pay the annuity; and, as a further security for the annuity, A and C demised the premises for two hundred years to a trustee for B. *Held*—That as against the lands of Blackacre, the annuity was, to the extent of the sum due on the mortgage of 1820, prior to the plaintiff's mortgage of 1825. *C. Walcott v. Condon* 1
2. A judgment obtained against a bankrupt, and registered as a mortgage,

- under the 6th and 7th sections of the 13 & 14 *Vic.*, c. 29, before the issuing of the commission, is a charge on the bankrupt's lands, in priority to his simple contract debts. *Bkt. Ct. In re Ryan* 33
3. The 13 & 14 *Vic.*, c. 29, thus repeals the 126th section of the 6 *W.* 4, c. 14, the leading Irish Bankrupt Act. *Ibid*
  4. *Quere*.—Whether an affidavit made by one only of several conuzees is a sufficient compliance with the terms of the 6th section? *Ibid*
  5. An equitable mortgagee, by deposit of Railway shares, is entitled to priority over a prior judgment creditor of the mortgagor, who has obtained an order charging the shares, under the 3 & 4 *Vic.*, c. 105, s. 23, subsequently to the mortgage. *R. Dunster v. Glengall* 47
  6. This Court will not appoint a receiver in a foreclosure suit, or a suit to raise a charge affecting lands, unless a year's interest is due, or the property is in danger of being evicted (*e. g.* for non-payment of head rent), or there is reason to apprehend that it will be insufficient to pay the charges on it. An absolute order for a sale in the Incumbered Estates Court will not of itself induce the Court to vary the rule. *R. Herbert v. Greene* 270
  7. But where a judgment creditor, who had registered an affidavit of ownership, under the 13 & 14 *Vic.*, c. 29, on the same day filed a cause petition, which was referred to the Master, under the 15th section of the Court of Chancery (Ireland) Regulation Act, 1850; and the Master made a decretal order, appointing a receiver for the payment of the sum due on foot of the judgment: the Court, on appeal, it appearing by affidavit that the lands would be insufficient to pay the judgment, extended the receiver, who had been appointed in another matter, but reserved the question of costs, until the produce of a sale which was pending in the Incumbered Estates Court should be ascertained. *Ibid*
  8. "I have had inquiry made from Mr.

Long and Mr. Darley, gentlemen well acquainted with the course and practice of the Court of Chancery, and I have been informed that the same rule prevails in that Court; and that in making up a foreclosure decree in the Court of Chancery, it is not of course to enter on the decree an order of reference for the appointment of a receiver, but that a case must be made at the hearing for such order, on some such grounds as I have stated."—*Per SMITH, M. R. Herbert v. Grenee* 275

9. "It is also a well settled general rule of the Court not to pay any part of the principal of a mortgage or charge out of the rents and profits, or to appoint a receiver for that purpose. Where the fund ultimately turns out to be deficient for the payment of incumbrances, the rents and profits received by a receiver are applied towards the payment of such incumbrances, in addition to the produce of the sale; but the general rule is, as I have stated, not to pay any part of the principal of the charge or incumbrance out of the rents and profits."

"The provision in the Sheriffs' Act to the contrary was an exception to the general rule; the appointment of a receiver under that Act being in the nature of an equitable execution, and in lieu of the elegit."—*Per SMITH, M. R. Id.* 275

#### NE EXEAT REGNO.

A respondent is not entitled to his discharge from custody under a *ne exeat regno*, upon the ground that he was made amenable to that writ by means of an arrest under a warrant issued on informations sworn by the petitioner, in respect of the same matters which were in question in the suit; even though the prosecution instituted in pursuance of those informations be eventually abandoned, if the petitioner appear to have had a *bona fide* intention of prosecuting the criminal proceedings at the time of procuring the arrest on the warrant. C. *Kelly v. Birch* 466

#### NEW TRIAL.

1. In cases relating to the devise of real estates, the Court intervenes only by reason of the existence of some impediment to proceeding at law, in order to have the rights of the parties submitted, by means of that intervention, to a legal issue before a jury; and the Court cannot decide against the verdict of a jury otherwise than by granting a new trial. C. *Rossborough v. Boyse* 489
2. According to the earlier authorities, the Court would not bind the inheritance by one trial; but there is now no absolute rule requiring the Court as of course to grant a second trial of an issue *devisavit vel non*, unless it is satisfied that a second trial may afford more satisfactory grounds for the final adjudication between the parties. *Ibid*
3. "The doctrine of the Court on this subject may have been at times more relaxed, and in earlier cases we find it said that the Court will not bind the inheritance, as it is expressed, by one trial. To whatever extent that notion may have prevailed, I think I may say it is no longer prevalent, and the current of modern authorities tends in the contrary direction."—*Per BRADY, L. C. Id.* 497
4. Where the Judge who tried the case expressed himself not dissatisfied with a verdict in an issue *devisavit vel non*, finding against the will, and the Court concurred in the verdict, and no new evidence had been discovered, although some existed, which the party had not availed himself of, the Court refused to grant a new trial. *Ibid.*

#### NOTICE.

See CHARGING ORDER.  
CHOSE IN ACTION.

#### NOTICE PARTIES.

See PARTIES.

#### NOTICE TO TREAT.

See AGREEMENT.  
RAILWAY COMPANY.

D †

## PARTIES.

A person who was properly an answering party in a cause, and is made a notice party, is not bound by the proceedings. Therefore, where a consent was signed by a solicitor, as solicitor for and on behalf of the plaintiff, and such solicitor happened to be the general solicitor of a person so circumstanced, it was *Held* that she was not bound by the consent, which did not purport to be signed on her behalf. *R. O'Grady v. Brady* 439

## PATENT.

*See* INJUNCTION.

## PLEADING.

*See* ESTOPPEL.

## PORTIONS.

A sum of £8000 was charged on lands of K. by a marriage settlement, as portions for children, to be shared or divided between them in such parts or proportions, and to vest and be paid to such children respectively at and upon such age, days or times, and to be subject to such charges, provisos and limitations, such charges or limitations being for the benefit of some or one of them, and in such manner as W. M. the younger, by any deed or deeds, instrument or instruments in writing, or by his last will, should direct or appoint, and in default of appointment to be equally divided between or among such children, share and share alike, the shares of sons to be paid at twenty-one, and the shares of daughters at twenty-one or marriage. W. M., by his will, bequeathed a legacy of £2000 to his wife, and the interest of the remainder of the money of which he might die possessed, for her own use and for the maintenance and education of his two daughters, and he charged his estate of K., as he was entitled to do by his marriage settlement, with £8000, which, together with the residue of his fortune, he wished to be divided in equal shares between his two daughters, and he left the residue of his fortune in money, after

paying the £2000 to his wife, together with the sum of £8000 charged upon the estate of K., to be equally divided between them; the entire to belong to either of his daughters, should the other not arrive at the age of eighteen years.—*Held*, that the will operated as an execution of the power under the settlement, and that the portions of the daughters vested at the testator's death, and bore interest from that date. *C. Murphy v. Murphy* 95

## POWER.

*See* PORTIONS.

VESTING.

1. By marriage articles, Blackacre, the property of the wife, was limited to the husband and wife for their lives and the life of the survivor of them, with remainder, subject to a term to secure portions of £1000 for younger children of the marriage, to the first and other sons of the marriage, in tail; and Whiteacre, the property of the husband, was settled upon the husband and wife and the survivor of them for their lives, with power for the survivor to appoint Whiteacre to any one or more of the children of the marriage; and in default of appointment, equally amongst them. The wife died first, leaving a son and a daughter. The husband, by his will, devised and appointed Blackacre to the son, and devised, limited and appointed Whiteacre to the daughter for her life, with remainder to the son, in case he should survive her; and declared it to be his intention that "the bequest to her should be taken as and for any sum or claim she might have under and by virtue of his marriage settlement, or any other deed executed by him."—*Held*, that the daughter was bound to elect between the £1000 portion and the benefit given her by the will. *C. Fearon v. Fearon* 19
2. A testator having, under his marriage settlement, a power of appointing a sum of £1500 amongst his children (which sum was, in default of appoint-

ment, to be divided amongst them equally), and having only two sons, H. and W., appointed to his son H. £1, and to his son W. £1; and as to the residue, appointed the same to his son W., adding:—"I request him to have the same invested on mortgage or in the purchase of lands, and settled on himself for life, with remainder to his child or children as he may appoint, with remainder to such child or children of my son H., as he may appoint, with remainder to my own right heirs." The testator, out of his own property, conferred by his will other benefits upon W. *Held*, that W. was bound to elect between his rights under the settlement and his rights under the will. C. *Moriarty v. Martin* 26

3. A power to appoint to and amongst children, in such shares and proportions, or to appoint a sum "to be divided to and amongst children in such shares," &c., as the donee of the power shall appoint, does not authorise the exclusion of any of the children. R. *Minchin v. Minchin* 167

4. A father, having a power of appointment over property, consisting of money and land, in favour of his two children A and B, by deed poll, reciting that £1000 had been paid to A, as a marriage portion out of the trust fund, and that it was intended as her share of the trust fund, and a satisfaction of her claim thereon, appointed and declared that the said sum of £1000, part of said trust fund, should be the full share of A; and he appointed the remainder of the property to B. By a deed, executed five days afterwards, reciting a mortgage by the father, of property not the subject of the power, to secure a portion of the trust fund lent to him; and that the father was indebted in another sum of £200, and that he had agreed to convey his equity of redemption, in consideration of B, the son, securing an annuity to his mother, and charging the equity of redemption with the debt of £200: the

father conveyed the equity of redemption to B, and B charged it, and the trust property which had been appointed to him, with an annuity for his mother, and with the debt of £200. *Held*, in the absence of evidence of the value of the equity of redemption, that the appointment could not be impeached by A, as against a purchaser without notice from B. C. *Mills v. Spear* 304

5. A marriage settlement recited an intention to secure a jointure for the wife; and the property (which was the husband's) was vested in trustees to secure same, and subject thereto, upon such uses and for such persons as the husband should appoint by deed or will, and in default thereof, for the children of the marriage, share and share alike.—*Held*, that the power was a general one, and not restricted to children of the marriage by the subsequent limitation in their favour. C. *Lanauze v. Malone* 354

6. The settlor, by his will, referred to the settlement, and confirmed the jointure, and bequeathed the lands *nomi-natim*, and all his other property, to trustees for the benefit (in the events that happened) of his only daughter (who afterwards died under age, &c.), with remainders over, but he did not refer to the power.—*Held*, that the power was well executed by the will in favour of the first remainderman. *Ibid*

7. A fund was bequeathed in trust for the separate use of A for life, and that she should be at liberty to dispose of it by her last will and testament, provided the power should not be exercised in favour of B. A, having survived her husband, made a will appointing the fund. *Held*, that the appointees were trustees for creditors of A, and the fund assets for payment of his debts. R. *Edie v. Babington* 568

8. The rule that where a general power of appointment is exercised in favour of a volunteer, he is a trustee for the creditors of the appointee, holds, where

the power is to be exercised by will only. R. *Edie v. Babington* 568

9. A power is general, though there be a restriction against exercising it in favour of one person. *Ibid*

## PRACTICE.

See ADMINISTRATION SUIT.

AFFIDAVIT.

APPEAL.

CHANCERY REGULATION ACT.

CHARGING ORDER.

CONDITIONAL ORDER.

CONSENT.

COSTS.

DECREE, 1, 4.

ENROLMENT.

FUND.

JUDGMENT, 6, 7.

MINOR.

NE EXEAT REGNO.

PARTIES.

PROHIBITION.

RECEIVER.

RECOGNIZANCE.

REVIVOR.

SALE.

SERVICE.

STOP ORDER.

SUGGESTION.

## PRIORITY.

1. In 1820, Blackacre and other lands were mortgaged for £1200. The equity of redemption in Blackacre having subsequently devolved upon A, he mortgaged it in 1825 to the plaintiff. In 1830, A contracted with B, that on B's paying to the mortgagee of 1820 the sum of £565, then remaining due on that mortgage, an annuity of £66 per annum should be "effectually granted to B out of the mortgaged premises." B paid £565 to the mortgagee of 1820. By deed of the 7th of November 1830, to which the only parties were the mortgagee of 1820, and C, the brother of A, reciting that £1454 was due on the mortgage of 1820, the mortgagee, in consideration of £1281, expressed to be paid to him by C "and others, for his use," conveyed Blackacre and the other mortgaged lands and the mort-

gage debt to C, his executors, administrators and assigns. By a deed, bearing date on the following day, reciting the mortgage of 1820, and that C had become entitled to it, and that A had become entitled to "several parts of the mortgaged premises," and that A and C had agreed to grant an annuity out of those premises—they, in consideration of £565, expressed to be paid to them, granted the annuity of £66 to B out of the mortgaged premises, including Blackacre. Then followed a covenant by A to pay the annuity; and as a further security for the annuity, A and C demised the premises for two hundred years to a trustee for B. *Held*, that as against the lands of Blackacre, the annuity was, to the extent of the sum due on the mortgage of 1820, prior to the plaintiff's mortgage of 1825. C. *Walcott v. Condon* 1

2. An equitable mortgagee, by deposit of railway shares, is entitled to priority over a prior judgment creditor of the mortgagor who has obtained an order charging the shares under the 3 & 4 Vic., c. 105, s. 23, subsequently to the mortgage. R. *Dunster v. Lord Glengall* 47
3. A stop order gives no priority to the party who has obtained it, unless it is lodged with the Accountant-General, the lodgment being equivalent to notice to the trustee of the fund, or the debtor. R. *Waller v. Wildridge* 155

## PROHIBITION.

1. The affidavits on which an application for a writ of prohibition is grounded ought to be entitled simply in the Court to which application is made. C. *Rich v. Anderson* 463
2. The writ of prohibition may be issued to stay proceedings before magistrates, even after conviction. The application to the Court of Chancery for a writ of prohibition is to the Common Law side of that Court, and the conditional order, though issued from the Registrar's office, should not resemble an injunction order. *Ibid*

## PURCHASE-MONEY.

### PURCHASE-MONEY.

See **CONDITIONAL ORDER.**

### PURCHASER FOR VALUABLE CONSIDERATION.

See **JUDGMENT, 7.**

**RE-DOCKETING, 3.**

### RAILWAY COMPANY.

1. A Railway Company served a notice to treat for the purchase of land; and persons in their employment, who either were, or acted as if they were, authorised to arrange on the price, obtained the vendor's signature to a printed form of agreement fixing the sum.—*Held*, that the Company were bound to specifically perform this agreement, though not signed by them under their corporate seal. *C. Smith v. Dublin and Bray Railway Company* 225
2. *Semble*.—An award made after the date of said agreement, and under the vendor's protest, by the arbitrator appointed pursuant to 14 & 15 *Vic.*, c. 70, was a nullity. *Ibid*
3. *Semble*.—Had the price to be paid for the land been ascertained by parol only, after service of the notice to treat, the contract would still have been binding. *Ibid*
4. "The other cases which I have referred to, and to which I need not more particularly allude, in 9 *Hare*, p. 306, *Munt v. The Shrewsbury and Chester Railway Company*, *Logan v. The Earl of Courtown*, all proceed on the same principle, which is a plain principle of public policy. The Court will therefore, no doubt, interfere in a fit and proper case, to prevent the diversion of the funds of the Company from the purpose for which it was constituted, and to prevent the exercise of the powers of the Company to effect an object which is not within the Act of Parliament which created them. There is a limit, however, and but one limit, I apprehend, to that interference of this Court, and that is, that it will not, as it is now settled by the case of *Heathcoate v. North Staffordshire*

## RAILWAY SHARES. 669

*Railway Company*, prevent parties from making an application to Parliament for any purpose which they may think fit out of their Act of Parliament, if it be a legal purpose. That is, I believe, I may say the only limit recognised by the Court, and the only restriction placed on its interference to prevent a deviation by the Company from the line of railroad or canal which it was constituted to carry out. It will prevent the application of the funds to the purpose of soliciting an Act of Parliament, though it will not restrain the parties from applying for the Act of Parliament."—*Per BRADY, L. C. M'Donnell v. The Grand Canal Company* 590

### RAILWAY SHARES.

1. *Quere*.—Whether the doctrine of *Dearle v. Hall*. (3 *Russ.* 1) is applicable to an equitable assignment of Railway shares? *R. Dunster v. Lord Glengall* 47
2. Shares in a Railway Company were standing in the name of a bankrupt at the time of his bankruptcy, on the 13th of November 1847. A large sum was then due on the shares, for calls, which the Company proved for in the bankruptcy in July 1849, and received a dividend, the assignees not requiring the shares to be brought in, and the secretary of the Company expressly stating that they had no security for the calls. Subsequent calls were made, the shares still remaining in the bankrupt's name. In July 1852, the Company served a notice on the bankrupt, that the shares would be forfeited, and accordingly the shares were declared forfeited, at a meeting of the directors. In May 1853, the assignees tendered the amount of the calls which fell due after the fiat.—*Held*, on a petition filed by the assignees against the Company, that the assignees might, when the Company proved for the calls, have had the transmission of the shares authenticated to them under the 8th *Vic.*, c. 16, s. 18 (*Com-*

panies Clauses Consolidation Act, 1845), and have had them sold for the benefit of the bankrupt's estate—but that the assignees not having then accepted the shares, they continued the property of the bankrupt, and had been forfeited for non-payment of the calls. *C. Turner v. The Dublin and Belfast Junction Railway Company* 526

3. *Semble*.—The proof under the bankruptcy was not equivalent to payment of the calls, so as to satisfy the provisions of the statute, which makes the payment of the calls a condition precedent to the right to transfer the shares. *Ibid*
4. The Court will not consider the *quantum* of interest of shareholders in a Company who seek for an injunction, nor whether their interest would entitle them to vote at a meeting of the Company; but where the petitioners had purchased two shares for a nominal consideration, after the agreement which they complained of had been entered into, and with full notice of it, and for the purpose of preventing its completion, the Court refused an injunction. *C. McDonnell v. The Grand Canal Company* 578

## RECEIVER.

*See* BANKRUPTCY, 2.  
COSTS, 6.

1. An order was made in a minor matter, that a receiver, who was also executor to the minors' father, should be at liberty until March 1847 to manage certain lands and the stock thereon in the same manner as the minors' father was in the habit of managing the same—the receiver undertaking to keep regular accounts of his receipts and to furnish the same to the Master every three months; and after March 1847, the receiver was ordered to take proper steps for procuring tenants to the property. The receiver continued to manage the lands after March 1847, without a further order.
- Semble*, the receiver's surety was liable

## RECEIVER.

for the management by the receiver as such; but not for so much of the quarterly balances as was due by him as executor up to March 1847. *R. In re Herricks minors* 183

2. *Quære*.—Whether the surety was liable to balances due after March 1847?
3. It is discretionary to charge a receiver's surety with interest on his balances; and the surety having paid the entire of the balances in this case, the Court refused to do so. *Ibid*
4. This Court will not appoint a receiver in a foreclosure suit, or a suit to raise a charge affecting lands, unless a year's interest is due, or the property is in danger of being evicted (*e. g.* for non-payment of head-rent), or there is reason to apprehend that it will be insufficient to pay the charges on it. An absolute order for a sale in the Incumbered Estates Court will not of itself induce the Court to vary the rule. *R. Herbert v. Greene* 270
5. But where a judgment creditor, who had registered an affidavit of ownership, under the 13 & 14 Vic., c. 29, on the same day filed a cause petition, which was referred to the Master under the 15th section of the Court of Chancery (Ireland) Regulation Act 1850; and the Master made a decretal order, appointing a receiver for the payment of the sum due on foot of the judgment: the Court, on appeal, it appearing by affidavit that the lands would be insufficient to pay the judgment, extended the receiver, who had been appointed in another matter, but reserved the question of costs, until the produce of a sale which was pending in the Incumbered Estates Court should be ascertained. *Ibid*
6. "It is a well settled general rule of the Court not to pay any part of the principal of a mortgage or charge out of the rents and profits, or to appoint a receiver for that purpose. Where the fund ultimately turns out to be deficient for the payment of incumbrances, the rents and profits received by a receiver are applied towards the

payment of such incumbrances, in addition to the produce of the sale ; but the general rule is, as I have stated, not to pay any part of the principal of the charge or incumbrance out of the rents and profits."

"The provision in the Sheriffs' Act, to the contrary, was an exception to the general rule; the appointment of a receiver under that Act being in the nature of an equitable execution, and in lieu of the *elegit*."—*Per SMITH, M. R. Herbert v. Greene* 275

7. "If an arrear of interest is due, which, previous to the Incumbered Estates Act, would have warranted the appointment of a receiver, it would be unreasonable that an incumbrancer should have to wait for the payment of such interest, during the interval which might elapse between the absolute order for the sale and the sale in that Court. But I do not understand the equity which the petitioner's Counsel alleges arises from the 42nd section of the statute, and that because the petitioner cannot, in consequence of the provisions of that section, be paid by a sale in this Court, and that some time may elapse before he is paid in the Incumbered Estates Court, that therefore he is entitled to be paid the principal as well as interest of his demand out of the rents and profits. I am quite unable to understand that equity."—*Per SMITH, M. R. Id.* 276

8. Neither the suing out an *elegit*, nor the appointment of a receiver on a judgment, not re-docketed or revived as required by the 9 G. 4, c. 35, will render it valid against a subsequent purchaser for valuable consideration. *P. C. In re Judge* 152

9. After a judgment debtor has become bankrupt, a receiver cannot be appointed on petition of the judgment creditor, though cause is shown only by a puisne mortgagee in possession. *C. Ryan v. Lefroy* 351

10. A sum was received by a respondent from the tenants, subsequently to the

appointment of a receiver by a puisne creditor. The receiver, in his account, was charged with the sum as received by him, and a conditional order for an attachment was obtained against the respondent, before the extension of the receiver, by a prior creditor.—*Held*, that as the tenants paid the sum prior to the extending order, it was to be considered as a sum paid by the tenants for the receiver, and that the petitioner in the first matter was entitled to it. *R. O'Callaghan v. O'Callaghan* 376

11. According to the practice of the Incumbered Estates Court, the purchaser is entitled to the rents from the last gale day previous to the purchase. as the Commissioners charge the purchaser interest at £5 per cent. from the expiration of fourteen days from the day of purchase or confirmation of the sale; therefore, where the sale took place on the 21st of July, the purchaser was declared entitled to the gale due on the 29th of September following, although he did not lodge his purchase-money until the 21st of October. *R. Walcott v. Condon* 431

12. After a receiver has been discharged, and the purchaser has gone into possession, the Court will not make an order that the tenants shall pay to the purchaser the rent which fell due prior to the discharge of the receiver; the receiver is to receive the arrear due prior to his being discharged, although the purchaser may be entitled to a portion of such arrear. The Court of Chancery does not order the *tenant* to pay such arrears to the *purchaser*. *Ibid*

13. The practice of the Court of Exchequer, as stated in *Jackson v. Jackson* (5 Ir. Eq. Rep.) and *Jameson v. Farrer* (3 Ir. Eq. Rep.), is not the practice of this Court. *Ibid*

14. Form of order in such case. *Ibid*

15. The Side-bar Rule, discharging a receiver, on the certificate of a sale in the Incumbered Estates Court, does not operate as an absolute discharge. Although he cannot proceed against

the lands for arrears of rent, he may proceed against the tenant by attachment or sequestration, on the Master's certificate, or by action in the name of the Master, where the tenant holds by lease under the Court, for the arrears due when the receiver was discharged. *R. Walcott v. Condon* 431

## RECOGNIZANCE.

See CROWN.

1. Judgment by default was entered up on a receiver's recognizance; a *levari* issued against the surety, and the Sheriff returned goods on hands for want of buyers. An injunction was granted against the *levari*, on payment of the amount of it into Court. The surety applied to set aside the judgment by default, and an order was made that the judgment should stand, but that the surety might be at liberty to plead to the *soire facias*. He did plead, and a demurrer taken to the rejoinder was allowed; and it was ordered that judgment be entered up for the plaintiff, which was accordingly done. *Held*, that the latter judgment was irregular, and the first, not being a continuing judgment, and being determined by the death of the receiver, a *levari* could not be sued out on it. *R. In the matter of Hericks minors* 183
2. The practice of the Petty-bag side of the Court, and of the three Law Courts under those circumstances, certified to the Master of the Rolls. *Ibid*
3. The Crown is not bound by the Bankers' Acts, 33 *G. 2*, c. 14 (*Ir.*), and 40 *G. 3*, c. 22 (*Ir.*): and there is no distinction in this respect between a Crown debt proper, and one upon foot of a receiver's recognizance, which is executed for the benefit of the subject, and is in reality a security between private parties. *C. The Queen v. Guinness* 211
4. The costs of the appointment of a receiver on a judgment on a receiver's recognizance, under the 4 & 5 *W. 4*, c. 55, and 3 & 4 *Vic.*, c. 105, are

chargeable beyond the penalty of the recognizance against the receiver, and *semble*, against his sureties, those costs not being costs at the Petty-bag side of the Court. *R. The Queen v. Dillon* 564

## RE-DOCKETING.

1. Whether judgments entered within twenty years before the passing of the Re-docketing Act, 9 *G. 4*, c. 35, and not re-docketed within twenty years from their entry, or within five years from the passing of the Act, are void as against a purchaser (a mortgagee of 1825), who became such before the passing of the Act? *Quære*.

*Held*—That such judgments were void as against a sub-mortgage (made in 1841) of the mortgage of 1825. *C. Walcott v. Condon* 1

2. "I have now to dispose of the plaintiff's claim to priority as against the judgments of 1819. My opinion remains the same as that which, along with Mr. Justice Crampton, I, when Chief Justice, certified in a case, *Colyer v. Marnell*, sent to the Court of Queen's Bench by this Court. I, therefore, am of opinion, that the mortgage of 1825, and the sub-mortgage of 1841 ought to have priority over the judgments of 1819; but I think that, in deference to the decision of my predecessor, in *Hickson v. Collis*, and in the conflict of judicial opinions on this subject, I ought not to act on the opinion, although I express it; and therefore *pro forma* I decree in favour of the judgment creditors."—*Per BLACKBURNE, L. C.* *Id.* 14
3. Neither the suing out of an *elegit* nor the appointment of a receiver on a judgment not re-docketed or revived as required by the 9th *G. 4*, c. 35, will render it valid against a subsequent purchaser for valuable consideration. *P. C. In re Judge* 152

## RELEASE.

By a deed of 1827, R. P. covenanted with his son D. P., that after the decease of R. P. P., the estate which should thereupon descend to or vest

in R. P. should be conveyed to certain uses. R. P. P. was found a lunatic, but in 1820 he had made a will, under which, if valid, G. P. took an estate tail. In 1830, the lunatic being dead, R. P., in violation of his covenant, conveyed the estate to R. H. P. In 1832 an ejectment was brought by those claiming under the will of the lunatic, at the trial of which R. P. and R. H. P. disputed the will. The conveyance of 1830 was set aside by a decree of the House of Lords, by which D. P. and his children were declared entitled, as against R. P. and R. H. P., to the benefit of the deed of 1827, and it was referred to the Master to settle a conveyance. The Master, by his report in 1843, found that D. P. had not laid before him any conveyance. In 1841, R. H. P. being in possession, a compromise was entered into between him and G. P., and two deeds were executed, by one of which G. P. released all right and title to the estate to R. H. P., in consideration of a conveyance of a portion of the estate which was made by the other deed. A supplemental bill having been filed by D. P. and his children to carry the decree of the House of Lords into execution against R. H. P. and G. P., who was not a party to the original suit—

*Held*, first—That though the plaintiffs had not availed themselves of their right of having a conveyance under the decree, they had not forfeited their right to the benefit of it, as R. H. P. had by the deeds of 1841 disabled himself from conveying the legal estate.

Secondly—That the first deed of 1841 being a release, and not a conveyance, was an acknowledgment of the estate by descent in R. H. P., and operated to confirm that estate, and therefore that the plaintiffs were entitled to have the Lords' decree enforced against G. P. (as claiming under R. H. P.), although he was not a party to the original suit. *C. Persse v. Persse*

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RENEWABLE LEASEHOLD  
CONVERSION ACT.

1. Where the landlord is seised in fee-simple of the reversion, he is entitled to compensation under the 5th section of the statute for the conversion of the estate in the reversion to an estate in the fee-farm rent. *Ex parte Knox* 57
2. "A question has, I believe, arisen as to whether there can be an appeal to the House of Lords against the decision of the Court in cases under the Renewable Leasehold Conversion Act, or from the decision of the Lord Chancellor on appeal? I apprehend it will be found that an appeal lies to the House of Lords in all cases where jurisdiction is given to the *Court of Chancery*. The 22nd. section of the Renewable Leasehold Conversion Act gives such jurisdiction. If authority is given to the Lord Chancellor alone by statute, some question would arise as to the right of appeal to the House of Lords; but I apprehend, where jurisdiction is given to the Court of Chancery, such jurisdiction is given subject, impliedly, to the right to appeal. The principal case on the subject is *Bignold v. Springfield*; and although the point was not decided in that case, it will, I think, be found that the opinion which Lord Brougham threw out is correct, and that on the grounds stated by Mr. Knight Bruce, who argued the question for the appellants, an appeal will lie. The observations of Lord Langdale, in the important case of *The Grand Junction Canal Company v. Dimes*, are important on this point."—*Per SMITH, M. R.* *Id.* 93

## RENEWAL.

*See DEED.*

The interest in a lease for lives renewable for ever was settled on A for life, remainder, subject to a jointure to A's wife, to the use of his children, who were minors. In 1839, one of the lives being dead, a negotiation for a renewal took place between A and B, one of six parties entitled to the

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reversion, acting on behalf of all. In 1847, a renewal was executed as an escrow by the reversioners, on the promise, which was not fulfilled, of immediate payment of the fine. In July 1849, a demand in writing of the renewal fines was made by B, on behalf of himself and the other parties interested, on A. In March 1851, another *cestui que vie* having died in the meantime, A tendered the amount of the renewal fines. *Held*, that the right to a renewal had been forfeited, and a petition for that purpose was accordingly dismissed, with costs. *C. Wood v. Knox* 109

2. A lease for lives renewable for ever was vested as to two-thirds in A, and one-third in B, subject to an underlease for years, at a profit rent. From 1779 to 1822 the head rent was paid by the sub-tenant who was in possession, and two-thirds of the profit rent to A, but it was not proved that any thing was paid to B. In 1822 the interest in the underlease was conveyed to the defendant, subject to the entire rent reserved by it. He continued to pay the head rent and two-thirds of the profit rent to A, and in 1832 he purchased the reversion in fee.

*Held*, on a bill filed by the representative of B, to have the benefit of a decree for a renewal in respect of A's interest: First—That no presumption of the extinguishment of B's third of the profit rent, or a conveyance of his third of the reversion, arose.

Secondly—That the retention of the profit rent gave the defendant no title, under the Statute of Limitations, as the third of the head rent must be presumed to have been paid or retained by him as the agent of those representing B's interest. *C. Hayes v. Woodley* 142

#### RENEWAL FINES.

1. A testator devised certain lands of Q., in trust, as soon as conveniently might be after his decease, to sell and dispose of the said lands, and that the money arising from the sale, together with

#### RENEWAL FINES.

the rents and profits of the said lands, until the same should be sold, should be considered as part of his personal estate, and should be applied and disposed of in the same manner as his personal estate. He gave his personal estate to trustees, upon trust, to pay his funeral expenses, debts and certain legacies, and in the next place, that the yearly amount of his personal estate thereby directed to be laid out in the purchase of lands, and the yearly rents and profits of the lands which should be purchased with such personal estate, or any part thereof, should be applied for the payment of his debts and legacies, until the same should be paid off and satisfied. And as to the residue of his personal estate, upon trust, to lay out the same in purchasing lands of inheritance in fee-simple, to be conveyed and assured to his grandson, A. T., and his heirs, subject to a charge for renewing certain chattel leases, and he directed a term for years to be created of such purchased lands for that purpose: and upon trust, that until a proper purchase could be had, the trust-money should be laid out at interest, and be applied towards discharging the purchase; and he directed his trustees to renew his chattel leases, which he bequeathed to A. T. for life. The testator died in 1771, and from that to 1837, A. T. continued in possession of the lands of Q. and the chattel leases. From 1820 to 1837 he paid large sums for renewal fines. *Held*, that the accumulation of the rents of the lands of Q. was to cease at the end of a year from the testator's death, and that the rents from that period to 1820, when the trust to raise the renewal fines arose, belonged to A. T.; but that subsequently to 1820, the rents were to be set off against the renewal fines. *C. Smith v. Lord Dungannon* 316

2. By the will, the testator bequeathed the lands of K. (held under a Bishop's lease, renewable every seven years), and all his other property (being personal), to trustees, upon trust to pay

the rents and other outgoings of K. as therein, and to preserve the interest in said lands by keeping up the renewals; and, after giving certain legacies, he bequeathed the residue of the lands of K., and the other property, to his daughter, her executors, &c.: but in case of her death, under age and unmarried, then over. On the testator's death, the daughter was a minor, and made a ward of Court; and the other personal estate not being sufficient for payment of his debts, the greater part of same were paid out of the rents of K., by the receiver in the minor matter, and renewals were also obtained, and the fines paid in like manner. The daughter died under age and unmarried, and a remainderman took. *Held*, that the personal representative of the minor was entitled to be repaid the principal money of such of the testator's debts as were paid out of the rents of K. during the minority, and which the other personal estate was insufficient to discharge, with interest thereon from the minor's death. C. *Lanauze v. Malone* 354

2. *Held also*, that the minor and remainderman were bound to contribute to the renewal fines, in proportion to the actual advantage they respectively obtained from the renewals. *Ibid*

## RENT.

See RENEWAL, 2.

## REVERSION.

See COMPENSATION.  
LANDLORD.

## REVIVOR.

The Court has not power to order service out of the jurisdiction of the notice of a suggestion to revive a suit. C. *Rosborough v. Boyse* 489

## SALE.

The conditional order to confirm a sale must be served on the inheritor, even if he have not appeared in the cause. C. *Copeland v. Conway* 486

## SCIRE FACIAS.

A writ of *sci. fa.* on a recognizance recited the recognizance, which purported to be taken by S., a Master Extraordinary of the Court, for the county of R. The writ further alleged that S. was a Master Extraordinary of the Court for the county of R. The plea traversed the allegation that S. was a Master Extraordinary for the county of R. *Held*, on demurrer, that the plea was bad, as the recital of the recognizance estopped the defendant from denying any of the material facts appearing therefrom, though afterwards substantively alleged. C. *The Queen v. Irwin* 638

## SEPARATE ESTATE.

1. The interest due at the time of a fund settled to the separate use of a married woman, with a clause against anticipation, charged with the amount of a promissory note indorsed by her. C. *Fitzgibbon v. Blake* 328
2. But *semble*, interest which accrued due after the date of the promissory note could not be charged with it. *Ibid*
3. The settlement recited an agreement to settle the lady's property for her sole use, free from her husband's debts, control, &c., and to be paid on the receipt only of the lady, or of such appointee as she should, by writing under seal, in each half-year, for that purpose appoint; no such appointment to extend beyond half a year; but to be capable of being renewed half-yearly; and no act or authority whatever to be capable of empowering the husband, or any one deriving through him, to take the property; but the lady to have power and authority in every other respect to dispose of the same, and the accumulations thereof, by deed or will, at all times, &c., as she should think fit, as fully as if she had remained sole and unmarried: and in case of her dying intestate, the property, and all accumulations thereof, to pass to her heirs and next-of-kin. The settlement, after vesting the property (a portion of

which consisted of two annuities or rentcharges) in the trustees thereof, proceeded to declare that they should have, receive and take said annuities from time to time, half-yearly, as same should become due or be paid; and after receipt thereof, pay over the net produce to the lady, on her own receipt, free from her husband's control, &c. And in a subsequent part of said settlement, it was declared that the trustees should carry into effect its true intent, &c., so as to maintain and apply to the sole use, &c., of the lady, and subject to her sole control, &c. (notwithstanding coverture), all and every her property, according as she should think fit, and so as to be payable into her own hands; and her own sole receipts, all in her own handwriting, and signed by her, to be the sole and only acquittances for the same. After the marriage, and during the husband's lifetime, the lady joined in executing a promissory note to the petitioner, to secure a debt of her own, and the suit was to raise the amount out of the securities. *Held*, that she was restrained during her husband's life from anticipating the annuities in that way; and accordingly the petition for a receiver over same was dismissed. *C. Doolan v. Blake* 340

## SERVICE.

1. The conditional order to confirm a sale must be served on the inheritor, even if he have not appeared in the cause. *C. Copeland v. Conway* 486
2. The Court has not power to order service out of the jurisdiction of the notice of a suggestion to revive a suit. *C. Rossborough v. Boyse* 489

## SET-OFF.

*See* RENEWAL FINES.

1. Cross demands arising in different rights cannot be made the subject of set-off. *R. Baldwin v. Baldwin* 388
2. The Court will not, without evidence, and from the mere non-payment of any sum by either party, presume an agreement that one demand should be set off against another. *Ibid*

3. A was tenant for life of an estate on which B had a charge; B was indebted to A by judgment, and in a sum for contribution. No interest was paid by A to B from 1838, for ten years, during which time A continued in possession of the estate, nor was any sum paid by B to A during that time. *Held*, after the death of both—First that there could be no set-off of one demand against the others, as A was not personally liable, for the interest and the demands were of a different nature. Secondly, that the Court would not, in the absence of direct evidence, presume an agreement for a set-off. *Ibid*

## SETTLEMENT.

*See* ESTATE.

1. W. C. being entitled to an annuity, and to a certain fund in reversion, on his first marriage, assigned them to trustees, in trust, to pay the annuity to W. C. for life, or until he should become bankrupt or insolvent; and from the time of his death, or of his so becoming bankrupt or insolvent, upon trust, in favour of the wife and the issue of the marriage. Upon his second marriage, W. C. assigned to trustees another fund, to which he was entitled after the death of A., in trust for himself for life after the death of A., or until he should fail in circumstances, or become bankrupt or insolvent; and after his decease, bankruptcy or insolvency, to pay the principal sum amongst his two children of the first marriage, and the issue of the second marriage, as he should appoint, &c. *Held*, that the insolvency in the settlement on W. C.'s first marriage, on which the limitation over was to take effect, was an inability to pay his debts, and not taking the benefit of the Insolvent Act. *R. In the matter of Casey's Trusts* 419
2. *Semble*, a limitation in a settlement, that the settlor's property shall go over on his insolvency, is valid. *Ibid*
3. *Held*, that the limitations in both the said settlements were valid as against

trustees, to whom W. C. had assigned his life interests for the payment of his creditors, when he was unable to meet his debts and liabilities. *Ibid*

4. *Held also*, that a failure, bankruptcy or insolvency, meant by the second settlement, before the death of A., the first tenant for life, would give effect to the limitation over. *Ibid*

## SOLICITOR.

1. "The employment of the same professional person, in the ordinary case of vendor and purchaser, is, from the conflicting nature of the duties which each employer has a right to have performed, for obvious reasons highly objectionable. Practically, and for the most obvious reasons, it is equally, if not more so, for the lender to employ the borrower's solicitor. Though there is not a conflict of rights, there is an opposition of interests, and the solicitor for the borrower must be anxious to remove the very difficulties which it is his duty to discover and suggest. There is, in short, such an inconsistency in the interests of each party, that a common agent of both can hardly do his duty to the one, without betraying or neglecting his duty to the other."—*Per BLACKBURN, L. C. Waring v. Waring*

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2. S. K. obtained probate of the will of E. K. The next-of-kin of E. K. appealed from the sentence of the Prerogative Court, and the Court of Delegates reversed that sentence. In contemplation of such reversal, S. K. had transferred a considerable fund, alleged to be a portion of the assets of E. K., to B., in order to retain the dominion over it if administration were granted to her opponent. The sentence of the Delegates was ultimately reversed, under a commission of review, and S. K. called on B. to refund the property. B. not having complied, S. K. filed a cause petition, on which an order, in the nature of a decree *pro confesso*, was made against him. B. was, by a subsequent order,

permitted to file answering affidavits, upon the terms of not relying on any defence, save that the said property was a gift to him.—*Held*, that if there had been any illegality in the original transaction, it could not, in that position of the cause, impede the petitioner's right to recover, even though appearing in her own case. *C. Kelly v. Birch*

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3. *Semble*.—That B. being an attorney, and having suggested the arrangement, without having stated to S. K. that it would be impossible to compel him to refund, would not, under any circumstances, have been permitted to rely on the illegality of the transaction as a defence to S. K.'s suit. *Ibid*

## STATUTES

## (CONSTRUCTION OF).

- "The rule laid down by Judge Burton, in *Warburton v. Ivis*, as to the construction of statutes, was cited and approved of by Baron Parke, in *Doldenay v. Colt*, and by Lord Justice Bruce, in *Gundry v. Penniger*. Judge Burton said, 'I apprehend it to be a rule, in the construction of statutes, that in the first instance the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention, or any declared purpose, or if it would involve any absurdity, repugnance or inconsistency, in its different provisions, the grammatical sense must then be modified, extended or abridged, so as to avoid such an inconvenience, but no further.'—*Per SMITH, M. R. Ellis v. O'Neill*

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## STATUTES CONSTRUED.

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| 10 <i>Car.</i> 1, sess. 2, c. 6.                 | 361                 |
| 33 <i>G.</i> 2, c. 14 ( <i>Ir.</i> )             | } Bankers' Acts 211 |
| 40 <i>G.</i> 3, c. 22 ( <i>Ir.</i> )             |                     |
| 9 <i>G.</i> 4, c. 35.                            | 152                 |
| 1 <i>W.</i> 4, c. 46. Illusory Appointment       | 167                 |
| 3 & 4 <i>W.</i> 4, c. 27. Statute of Limitations | 236                 |
| 8 & 9 <i>Vic.</i> , c. 69. Drainage Act          | 220                 |
| 8 & 9 <i>Vic.</i> , c. 42.                       | 578                 |
| 13 & 14 <i>Vic.</i> , c. 29.                     | 33                  |

## STATUTE OF LIMITATIONS.

1. A lease for lives renewable for ever was vested as to two-thirds in A, and one-third in B, subject to an underlease for years, at a profit rent. From 1779 to 1822 the head rent was paid by the subtenant who was in possession, and two-thirds of the profit rent to A, but it was not proved that any thing was paid to B. In 1822 the interest in the underlease was conveyed to the defendant, subject to the entire rent reserved by it. He continued to pay the head rent and the two-thirds of the profit rent to A, and in 1832 he purchased the reversion in fee.

*Held*, on a bill filed by the representative of B, to have the benefit of a decree for a renewal in respect of A's interest—

First—That no presumption of the extinguishment of B's third of the profit rent, or of a conveyance of his third of the reversion, arose.

Secondly—That the retention of the profit rent gave the defendant no title, under the Statute of Limitations, as the third of the head rent must be presumed to have been paid or retained by him as the agent of those representing B's interest. *C. Hayes v. Woodley* 142

2. "Now if we regard the consequences of this doctrine, contended for by the defendant, I need not say how alarming it is, in a country where subtenures are so general; but I have no idea that an occupying tenant, liable to pay a rent-service, can be allowed to avail himself of the Statute of Limitations, because he has only paid so much of his rent as keeps down the head rent." *Per BLACKBURNE, L. C.*

*Id.* 151

3. An acknowledgment of a judgment debt in the will of the debtor is sufficient to take it out of the operation of the Statute of Limitations (3 & 4 W. 4, c. 27, s. 40). *C. Millington v. Thompson* 237
4. In 1811, T. H. executed a bond, in which his heirs were not bound, and on which he paid interest until his death, in 1820. T. H. made his will,

## SURETY.

by which he left all his property to W. H. H., and directed that all his just debts, legacies and funeral expenses should be paid by W. H. H., whom he appointed executor. W. H. H. proved the will, and aliened the lands in 1821, without receiving a pecuniary equivalent; he, however, paid interest on the bond until he died in 1843. The parties claiming under the deed of 1821 paid interest up to 1849, under a mistaken belief of their liability. A cause petition was filed in 1853, to recover the amount of the bond, from the representatives of W. H. H.—*Held* (affirming the order of the Master of the Rolls), that the claim against W. H. H., being founded on a breach of a trust created without a specialty executed by him, was a simple contract debt, and as such barred by the Statute of Limitations, 10 Car. 1, sess. 2, c. 6, s. 3 (*Ir.*) *C. Brereton v. Hutchinson* 361

## STOP ORDER.

A stop order gives no priority to the party who has obtained it, unless it is lodged with the Accountant-General, the lodgment being equivalent to notice to the trustee of the fund, or the debtor. *R. Waller v. Wildridge* 155

## SUGGESTION.

The Court has not power to order service out of the jurisdiction of the notice of a suggestion to revive a suit. *C. Rossborough v. Boyse* 489

## SURETY.

*See* JUDGMENT, 8.

## RECOGNIZANCE, 1.

1. An order was made in a minor matter, that a receiver, who was also executor to the minor's father, should be at liberty until March 1847 to manage certain lands and the stock thereon, in the same manner as the minor's father was in the habit of managing the same—the receiver undertaking to keep regular accounts of his receipts, and to furnish the same to the Master every three months; and after March 1847, the receiver was ordered

to take proper steps for procuring tenants to the property. The receiver continued to manage the lands after March 1847, without a further order.

*Semble*, the receiver's surety was liable for the management by the receiver as such; but not for so much of the quarterly balances as was due by him as executor up to March 1847. R. *In re Herricks minors* 183

2. *Quere*—Whether the surety was liable to balances due after March 1847? *Ibid*

3. It is discretionary to charge a receiver's surety with interest on his balances, and the surety having paid the entire of the balances in this case, the Court refused to do so. *Ibid*

## TIMBER.

1. The question on a reference to inquire whether timber be essential to the possession and enjoyment of an estate, is one partly of fact and partly of opinion and taste; the end of the inquiry being to ascertain whether though, in respect of its intrinsic value, it may admit of pecuniary compensation, its adventitious value as an ornament to the estate be not so material as that it may reasonably be supposed that, without it, the purchaser would not have entered into the contract at all. C. *Stewart v. The Marquis of Conyngham* 104

2. Where the timber, the subject of the inquiry, grew on a comparatively small portion of the estate, detached from the demesne, and not in view of the mansion-house, pleasure grounds or avenues, and the Master reported that it was not essential to the possession and enjoyment of the estate, though there were conflicting affidavits as to whether it was ornamental or not, the Court (reversing the order of the Master of the Rolls) refused to send back the report to be re-considered on further evidence. *Ibid*

## TITHE RENTCHARGE.

1. In 1731, the lands of B. and M., with so much of the tithes as were vested

in the lessor, were demised for fifty-one years. In 1764, F. became entitled to the interest in the lease, and so continued until 1782, when it expired. The lands of B., C. and M. were demised to F., for lives, with covenant for perpetual renewal, in 1751.

In 1766, the tithes of B., C. and M. were demised for lives, with covenant for perpetual renewal. In 1813 and 1832, renewals of the lease were granted, the interest of which was vested in A. In 1834, a tithe composition was made in the parish where the lands were situate, and the commissioners certified that a certain proportion of the tithes was payable to those claiming under the lease of 1766, and the remainder to the vicar. There was no evidence of the payment of tithes for sixty years previous to 1834. *Held*, overruling objections to the Master's report, that the right of exemption from the payment of tithes, under the 1 & 2 *Vic.*, c. 109, s. 18, was not established, the case falling within the exception in sec. 20.

The exception in that 1 & 2 *Vic.*, c. 109, s. 20, is not confined to the case of a demise of tithes to the owner or occupier of lands, in respect of which the tithes are payable. R. *Ellis v. O'Neill* 280

2. Where there is no evidence of the payment of tithes from a particular denomination, for sixty years next preceding the establishment of a composition in lieu of tithes in the parish, the presumptive bar thus created under the 1 & 2 *Vic.*, c. 109, s. 18, is not avoided by showing that the tithes of the lands in question had, amongst others, been demised to a person, not in privity with the lands, for a term which was subsisting at the date of the passing of the said Act. S. C. reversed by L. C. 609

## TRIAL AT LAW.

See NEW TRIAL.

## TRUST.

*See* DEED, 4.

POWER, 7, 8.

RENEWAL FINES, 1.

## TRUST (BREACH OF).

1. The defendant had acted gratuitously as the agent of the plaintiff, transmitting to her the interest of charges to which she was entitled. One of the charges was paid to the defendant, which the plaintiff directed him to invest on a specified real security, which he was unable to do; but which, without her authority, he lent to L., for whom he was also agent, and who was indebted to him, on the security of a bond and warrant of attorney to enter judgment. He inclosed the bond and warrant to her in a letter, in which he stated, contrary to the fact, that the money had been applied to pay off a charge on his estate. L. afterwards, on his son's marriage, conveyed a part of the estate in trust to pay off charges on his estate, another part to the use of his son and his issue; and the lands of C. in trust to secure his debt to the defendant. The defendant, in several letters, offered to give the plaintiff's claim priority over his demand on the lands of C.—L. being dead, leaving no assets to pay the plaintiff's claim, the Court, on a bill filed by her, declared the plaintiff entitled to a specific performance of the contract contained in the letters, and that the defendant was a trustee for the plaintiff, as to so much of his security on the lands of C. as would be sufficient to pay her claim; and ordered that he should execute a deed declaring the trust. C. *O'Beirne v. Cornwall* 130
2. An executor lent a sum of £4100 of his testator's assets, on the security of a property, worth at the time between £60,000 and £70,000, and incumbered to the amount of £27,000. The solicitor for the borrower was also employed for the executor, the lender. No opinion of Counsel was taken on the title, and no searches were made,

as it had been done on two occasions within seven years, on other loans. The security having turned out defective in value, the executor was decreed to bring in the money. C. *Waring v. Waring* 331

## TRUSTEES.

*See* COSTS, 2.

Trustees of real estate, upon trust to sell for the payment of charges, are entitled to the costs of a suit out of the surplus only, after payment of the charges.

Where the fund was deficient, the Court refused them costs. C. *White v. Villiers* 125

## TRUSTEE ACT.

The legal estate of a mortgage was vested in two trustees, one of whom was out of the jurisdiction. The Court, in order that the mortgage might be reconveyed to the mortgagor, pursuant to a decree in a foreclosure suit, made an order under the Trustee Act, that the mortgage should vest in the other trustees solely, and directed the costs of the petition to be costs in the suit. R. *Corker v. Ryan* 562

## VENDOR AND PURCHASER.

*See* AGREEMENT, 1.

RAILWAY CO., 1.

SOLICITOR.

TIMBER.

WRIT OF ERROR.

1. According to the practice of the Incumbered Estates Court, the purchaser is entitled to the rents from the last gale day previous to the purchase, as the Commissioners charge the purchaser interest at £5 per cent. from the expiration of fourteen days from the day of purchase or confirmation of the sale; therefore, where the sale took place on the 21st of July, the purchaser was declared entitled to the gale due on the 29th of September following, although he did not lodge his purchase-money until the 21st of October. R. *Walcott v. Condon* 431
2. After a receiver has been discharged, and the purchaser has gone into pos-

session, the Court will not make an order that the tenants shall pay to the purchaser the rent which fell due prior to the discharge of the receiver; the receiver is to receive the arrear due prior to his being discharged, although the purchaser may be entitled to a portion of such arrear. The Court of Chancery does not order the *tenant* to pay such arrears to the *purchaser*. R. *Walcott v. Condon* 431

3. The practice of the Court of Exchequer, as stated in *Jackson v. Jackson* (6 Ir. Eq. Rep.) and *Jameson v. Farrer* (3 Ir. Eq. Rep.) is not the practice of this Court. *Ibid*

4. Form of order in such case. *Ibid*

5. The Side-bar Rule, discharging a receiver, on the certificate of a sale in the Incumbered Estates Court, does not operate as an absolute discharge. Although he cannot proceed against the lands for arrears of rent, he may proceed against the tenant by attachment or sequestration, on the Master's certificate, or by action in the name of the Master, where the tenant holds by lease under the Court, for the arrears due when the receiver was discharged. *Ibid*

6. "What the rule would be if the gale was to fall due after the sale and before the confirmation of the sale, or within the fourteen days during which no interest is payable, does not appear. The principle of the rule of the Incumbered Estates Court appears to be, that as interest is charged on the purchase-money, the payment is considered to have been made at the time from which the interest is charged; and it is no doubt reasonable that the purchaser should have the rents where he pays interest. But suppose the purchase was made on the 22nd of September, the interest would only be payable from the 6th of October; and in such a case a question might arise, as to whether the purchaser ought to have the rents which fell due on the 29th of September, where the interest on the purchase-money

did not commence to run until after that day. It is not necessary, however, to offer any opinion on that question in the present case."—*Per SMITH, M.R.* *Id.* 232-4

VESTING.

A sum of £8000 was charged on lands of K. by a marriage settlement, as portions for children, to be shared or divided between them in such parts or proportions, and to vest and be paid to such children respectively at and upon such age, days or times, and to be subject to such charges, provisoes, and limitations, such charges or limitations being for the benefit of some or one of them, and in such manner as W. M. the younger, by any deed or deeds, instrument or instruments in writing, or by his last will, should direct or appoint, and in default of appointment to be equally divided between or among such children, share and share alike, the shares of sons to be paid at twenty-one, and the shares of daughters at twenty-one or marriage. W. M. by his will bequeathed a legacy of £2000 to his wife, and the interest of the remainder of the money of which he might die possessed, for her own use and for the maintenance and education of his two daughters, and he charged his estate of K., as he was entitled to do by his marriage settlement, with £8000, which, together with the residue of his fortune, he wished to be divided in equal shares between his two daughters, and he left the residue of his fortune in money, after paying the £2000 to his wife, together with the sum of £8000 charged upon the estate of K., to be equally divided between them; the entire to belong to either of his daughters, should the other not arrive at the age of eighteen years.—*Held*, that the will operated as an execution of the power under the settlement, and that the portions of the daughters vested at the testator's death, and bore interest from that date. C. *Murphy v. Murphy* 95

## VESTING ORDER.

The legal estate of a mortgage was vested in two trustees, one of whom was out of the jurisdiction. The Court, in order that the mortgage might be re-conveyed to the mortgagor, pursuant to a decree in a foreclosure suit, made an order under the Trustee Act, that the mortgage should vest in the other trustees solely, and directed the costs of the petition to be costs in the suit. *R. Corker v. Ryan* 562

## WILL.

See DEVISE.

LEGACY.

STATUTE OF LIMITATIONS.

"Though it is indisputably true that the same words in a will may, in certain cases well recognised and established, have a different operation according to the different subject to which they relate, yet the plain rule of construction in general is, to give them the same signification and effect. I do not find any case contravening this rule, when the same clause in the will operates both as a bequest and an execution of a power." *Per BLACKBURNE, L. C. Murphy v. Murphy* 102

## WRIT OF ERROR.

1. An injunction against felling timber having been obtained against the respondent, on a motion to dissolve it, the Court directed an action to be brought. An action having been brought, and the respondent having obtained judgment in the Exchequer Chamber, the Court dissolved the injunction, notwithstanding the pendency of a writ of error to the House of Lords; it not appearing that irreparable mischief would be done to the petitioner by dissolving the injunction. *R. Earl of Mountcashell v. Viscount O'Neill* 455

## WRIT OF ERROR.

2. "Where a decree is made in a Court of Equity, upon a matter peculiarly falling within its jurisdiction, the Judge may feel desirous to stay the proceedings, in order to afford an opportunity of appealing against his own decision; but where the interference of the Court of Equity is sought in aid of an alleged legal right, no case has been referred to in which the Court of Equity has declined to act on the decision of the Court of Law, because a writ of error was pending. Suppose, in this case, that the injunction was now, for the first time, applied for, would the Court be justified in disregarding the decision of the Court of Exchequer Chamber? Was it ever heard, up to the present case, that the pendency of a writ of error at law, and nothing more, was a ground for filing a bill or cause petition for an injunction to stay proceedings at law on the judgment? or has a Court of Equity ever granted an injunction to suspend the effect of a judgment at law—the question being a purely legal question? The result of such a novel decision would be productive, in my opinion, of the worst consequences." *Per SMITH, M. R. Id.* 460-1

3. An injunction against felling timber was obtained against the respondent; but the respondent by his affidavit in answer claimed the timber as his own property; and on a motion to dissolve the injunction, founded on that affidavit, the Court directed an action to be brought to try the legal right. An action having been brought, the respondent obtained the judgment of the Court of Exchequer Chamber, one Judge alone dissenting. The petitioner sued out and prosecuted a writ of error to the House of Lords. *Held*, reversing the order at the Rolls, that the injunction ought to be continued. *C.—[S. C. reversed.]* 619











